(13)

No. 92-603-CFX
Status: GRANTED

Title: Federal Communications Commission and United States, Petitioners
v.
Beach Communications, Inc., et al.

Docketed:
October 7, 1992

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Fox,Brenda L., Ellis,James D., Sinderbrand,Paul J., Costlow,Deborah C., Siegel,Ronald A., Grambow,Martin E., Epstein,Gary M., Sinderbrand,Paul J., Burstein,Diane B.

9-1-92 ext til 10-7-92, C.J. Rehnquist, - CITED.

Entry	Date	Note	Proceedings and Orders
1	Aug 28 1992	G	Application (A92-172) to extend the time to file a petition for a writ of certiorari from September 7, 1992 to October 7, 1992, submitted to The Chief Justice.
2	Sep 1 1992		Application (A92-172) granted by the Chief Justice extending the time to file until October 7, 1992.
3	Oct 7 1992	G	Petition for writ of certiorari filed.
4	Oct 28 1992		Brief of respondent National Cable Television Association, Inc. in support of petition filed.
5	Nov 4 1992		DISTRIBUTED. November 25, 1992
6	Nov 9 1992	X	Brief of respondents Beach Communications, Inc., et al. in opposition filed.
7	Nov 18 1992	X	Reply brief of petitioners Federal Communications Commission and United States filed.
8	Nov 24 1992	X	Supplemental brief of respondents filed.
9	Nov 30 1992		Petition GRANTED.
			**********
14	Jan 11 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the District of Columbia Circuit.
10	Jan 14 1993		Brief of respondent National Cable Television Association, Inc. in support of petition filed.
11	Jan 14 1993		Joint appendix filed.
12	Jan 14 1993		Brief of petitioners United States and FCC filed.
13	Jan 14 1993		Brief amici curiae of National League of Cities, et al. filed.
16	Feb 12 1993		CIRCULATED.
17	Feb 22 1993	X	Brief of respondents Beach Communications, et al. filed.
15	Mar 3 1993		SET FOR ARGUMENT MONDAY, MARCH 29, 1993. (1ST CASE).
18	Mar 16 1993		Record filed.
		*	Record proceedings Federal Communications Commission.
19	Mar 17 1993	X	Reply brief of petitioners Federal Communications Commission, et al. filed.
20	Mar 29 1993		ARGUED.

92-603

No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

BEACH COMMUNICATIONS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

The Cable Communications Policy Act of 1984 exempts from coverage facilities that serve "only subscribers in 1 or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities use[] any public right-of-way." 47 U.S.C. 522(6). The question presented is whether the resulting regulatory distinction between facilities serving separately rather than commonly owned, controlled, or managed buildings is rationally related to a legitimate government purpose under the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioners, respondents below, are the United States and the Federal Communications Commission. Respondents, petitioners below, are Beach Communications, Inc., Maxtel Limited Partnership, Pacific Cablevision, and Western Cable Communications, Inc. Respondents, intervenors below, are Spectradyne, Inc., National Cable Television Association, Inc., Wireless Cable Association, Inc., Southwestern Bell Corporation, and Hughes Communications Galaxy, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 965 F.2d 1103. A previous opinion of the court of appeals in this case (App., *infra*, 8a-45a) is reported at 959 F.2d 975.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1992. On September 1, 1992, the Chief Justice extended the time for filing a petition to and

including October 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

Section 602(6) of the Communications Act of 1934, as amended, provides (47 U.S.C. 522(6)):

> [T]he term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include * * * (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way * * * [.]

STATEMENT

The court of appeals in this case took the extraordinary step of striking down an Act of Congress under the Due Process Clause of the Fifth Amendment because the court concluded that a distinction drawn in the regulatory statute was not rationally related to any legitimate government purpose. The court's conclusion was not only wrong with respect to the particular statute before it—various reasons for the distinction can readily be conceived, as the dissent pointed out—but also reflected a fundamentally flawed approach to judicial review of regulatory statutes. This Court should grant certiorari not only because passing on the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform," *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.), but also to correct the basic errors in the D.C. Circuit's approach to rational-basis review.

As the court of appeals noted, a "traditional cable system receives signals at a remote location and transmits them throughout a community via a network of wires that use local rights-of-way." App., *infra*, 11a. In contrast, a Satellite Master Antenna Television (SMATV) system is a facility that receives signals via satellite and retransmits them by wire from a satellite antenna to units in a multiple-unit building or building complex. *Ibid.*; see *In re Definition of a Cable Television System*, 5 F.C.C. Rcd. 7638, 7639 (1990) (describing SMATV systems). This case involves a challenge by SMATV companies to Congress's imposition of a franchising requirement upon cable facilities that physically interconnect separately owned, controlled, and managed buildings without using public rights-of-way. Under the plain language of 47 U.S.C. 522(6), such facilities are "cable systems" subject to franchising requirements under 47 U.S.C. 541(b)(1), while similar facilities that serve commonly owned, controlled, or managed buildings are not. The question presented is whether the court of appeals erred in holding that the distinction between separate and common ownership, control, and management lacks a rational basis

under the equal protection component of the Due Process Clause of the Fifth Amendment.

1. a. The Cable Communications Policy Act of 1984 (Cable Act), Pub. L. No. 98-549, 98 Stat. 2779, provides in pertinent part that "a cable operator" may not supply "cable service without a franchise." 47 U.S.C. 541(b)(1). A "cable operator" is one who provides service through "a cable system" (47 U.S.C. 522(4)), which is defined as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. 522(6). The definition of "cable system," however, contains a "private cable" exemption for any "facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way." 47 U.S.C. 522(6)(B).

b. This action arises out of a Federal Communications Commission proceeding interpreting the term "cable system" as applied to SMATV facilities. The Cable Act's definition of "cable system" is substantially similar to the FCC's pre-Cable Act regulatory definition of "cable television system."[1] Compare 47 U.S.C. 522(6) with 47 C.F.R. 76.5(a) (1984). Of relevance here, the Act incorporated the regulatory "private cable" exemption, but added the proviso that denies exemption to facilities that "use[] any public right-of-way" 47 U.S.C. 522(6)(B). In view of the new proviso, the Commission initially construed Section 522(6)(B) to mean that "[w]hen multiple unit

[1] Prior to 1984, the Commission had since 1965 regulated cable communications pursuant to authority under the Communications Act of 1934. See *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 697 (1965); see also *Malrite T.V.* v. *FCC*, 652 F.2d 1140, 1143-1147 (2d Cir. 1981) (describing subsequent developments in cable regulation), cert. denied, 454 U.S. 1143 (1982). In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), the Court sustained the Commission's authority to issue cable regulations "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting."

dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not * * * ownership, control or management." See *In re Amendments of Parts 1, 63, & 76*, 104 F.C.C.2d 386, 396-397 (1986).

Subsequently, however, the Commission issued the report and order at issue here, which revised and clarified its interpretation of the term "cable system" under the Act. See *In re Definition of a Cable Television System*, 5 F.C.C. Rcd. 7638 (1990). First, observing that Section 522(6) requires the use of "closed transmission paths," the FCC found that the term "cable system" does not include any facility that uses nonphysical transmission media (such as radio waves) to send signals to multiple-unit buildings. 5 F.C.C. Rcd. at 7638-7639. Second, the Commission determined that facilities serving only a single multiple-unit building by wire are not "cable systems." *Id.* at 7640-7641. Third, reversing its prior order interpreting the Act's "private cable" exemption, the Commission concluded that the exemption continues to include the "common ownership"

requirement[2] where facilities physically interconnect more than one multiple-unit building. *Id.* at 7641-7642.[3]

Thus, as the FCC interprets the statute, a SMATV operator who does not use public rights-of-way is subject to the Act if he serves separately owned multiple-unit dwellings, but not if he serves commonly owned multiple-unit dwellings. In addition, an otherwise covered SMATV operator who uses nonphysical means to transmit service is not covered, while one who uses physical means is.

2. a. Respondents[4] challenged the FCC's interpretation of the Cable Act on statutory and constitutional grounds. The court of appeals first rejected respondents' contention that the Cable Act does not cover SMATV facilities that serve separately owned, controlled, and managed buildings without crossing public rights-of-way. The court reasoned that, under the plain language of 47 U.S.C. 522(6), such facilities

[2] For purposes of simplicity, we refer to the requirement of "common ownership, control, or management" as the "common ownership" requirement. We also use the terms "commonly owned" or "separately owned" to refer to ownership, control, and management.

[3] In that regard, the Commission noted that a contrary interpretation would not only "render the 'common ownership, control, or management' portion of the statutory definition superfluous," but also eliminate an "aspect of the ['private cable'] exception [that] has been a part of our definition of a cable system from the beginning." 5 F.C.C. Rcd. at 7641.

[4] We use the term "respondents" to refer to petitioners below, Beach Communications, Inc., Maxtel Limited Partnership, Pacific Cablevision, and Western Cable Communications, Inc.

satisfy all of the criteria for coverage.[5] The court also found the facilities ineligible for the "private cable" exemption in Section 522(6)(B), which in plain terms requires "common ownership, control, or management" of the buildings served. App., *infra*, 20a-21a.

The court, however, found merit in respondents' claim that Section 522(6) violates the Fifth Amendment because there is no rational basis for imposing franchise requirements upon the covered SMATV facilities, while exempting (a) SMATV facilities that satisfy the "common ownership" requirement and use no public rights-of-way, and (b) distribution systems using nonphysical media to transmit signals to multiple-unit dwellings.[6] The court agreed with re-

[5] Respondents conceded that their facilities use "closed transmission paths" and associated equipment and supply "video programming." App., *infra*, 20a. And the court was unpersuaded by their contention that SMATV facilities do not serve "multiple subscribers within a community" (47 U.S.C. 522(6)) because service is limited to a particular group of buildings within a community. App., *infra*, 20a.

[6] Respondents also claimed that applying a franchising requirement to their cable operations violated the First Amendment. The court, however, found that claim unripe. App., *infra*, 25a-31a. The court acknowledged that 47 U.S.C. 541(b)(1) imposes a franchising requirement upon the SMATV operators, but noted that because of the local discretion over particular franchising duties, and "because the justification for [those] dut[ies] will depend on local facts," a pre-enforcement facial attack upon Section 522(6) under the First Amendment was unfit for present judicial determination. App., *infra*, 25a-27a. Finally, because it is unclear whether particular franchising systems would impose any substantial compliance costs, and because respondents may file anticipatory as-applied challenges, the court found that

spondents that no rational basis was evident "[o]n the record before [it]." App., *infra*, 34a. Finding that the traditional rationale for cable franchising—the use of public rights-of-way—did not apply to any of the pertinent classes of facilities, the court was unable to discern any alternative ground for distinction in the legislative record or "to imagine *any* basis" itself. *Id.* at 34a-35a. The court remanded the case to the FCC to create an administrative record of "legislative facts" suggesting a "conceivable basis" for the distinction. *Id.* at 36a.[7]

b. Chief Judge Mikva concurred in part and concurred in the judgment, but refused to join the court's equal protection analysis. App., *infra*, 36a-45a. Noting that the Cable Act bears a "very strong presumption of constitutionality" that may be sustained "by justifications in or out of the record," he found the challenged distinctions "entirely reasonable in light of the * * * Act's purposes." *Id.* at 40a-41a. With respect to the Act's distinction between facilities interconnecting buildings by wire, rather than nonphysical transmission media, the concurrence suggested that the classification serves Congress's objec-

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the availability of criminal and civil penalties for noncompliance with the Act (47 U.S.C. 501, 503) did not amount to hardship requiring immediate judicial review. App., *infra*, 30a-31a.

[7] Respondents also contended that the court should apply heightened scrutiny under the equal protection component of the Due Process Clause, because the classification at issue infringed fundamental First Amendment rights. App., *infra*, 31a. The court noted that if the Commission provided a rational basis for the classification, the court would have to decide whether a "fundamental rights" equal protection claim was ripe. *Id.* at 32a.

tive of promoting new technologies, by "creat[ing] an incentive for SMATV operators to switch from physical wiring to radio transmission so that they are exempt from regulation." *Id.* at 42a. As for the "common ownership" requirement in 47 U.S.C. 522(6)(B), the concurrence noted that Congress could have reasoned that a SMATV system "serving multiple buildings not under common ownership is similar to a traditional cable system," but that one "serving buildings under common ownership is likely to be smaller, and the ability of residents to influence ownership [is] likely to be greater." App., *infra*, 43a. Chief Judge Mikva, however, concurred in the remand to allow the FCC "to put the classifications in context." *Id.* at 44a.

3. a. The FCC's report to the court of appeals endorsed the reasoning of the concurrence without offering additional supporting facts. See App., *infra*, 50a. After receiving the report, a divided court of appeals held the Cable Act unconstitutional, finding no rational basis for the "common ownership" requirement. *Ibid.*[8] While acknowledging that Chief Judge Mikva had suggested justifications for the requirement in his prior opinion, the court reasoned that it had "no basis for assuming" the state of facts that he had posited and found it dispositive that "the FCC has wholly failed to flesh th[ose] [justifications] out, or to suggest some alternative rationale." *Id.* at 4a. The court accordingly held that SMATV systems serving customers in buildings under separate

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[8] Although it had adverted to the issue in its initial decision, the majority did not address whether there was a rational basis for distinguishing facilities using physical transmission media from those using nonphysical media, such as radio waves. App., *infra*, 3a.

ownership, control, and management, were to be exempted from the Act's franchise requirements if they did not use public rights-of-way. *Id.* at 5a-6a.

b. Chief Judge Mikva dissented for the reasons advanced in his prior concurring opinion. App., *infra*, 7a.

REASONS FOR GRANTING THE PETITION

A divided panel of the court of appeals invalidated an Act of Congress regulating cable communications on the ground that the Act's classification of cable facilities lacks any conceivable rational basis. In so doing, the court repudiated Congress's judgment that the rationale for regulating cable facilities is generally diminished when a facility only serves dwelling units under common ownership, control, or management. The court's rejection of Congress's policy judgment (which also reflects longstanding FCC practice) was premised on basic errors in the application of rationality review under the equal protection component of Due Process Clause. In particular, contrary to this Court's decision, see, *e.g.*, *Sullivan* v. *Stroop*, 496 U.S. 478, 485 (1990); *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980), the majority effectively held that the rational basis for a distinction drawn by an Act of Congress must appear on a legislative or administrative record. The court of appeals' failure to adhere to this Court's precedents, moreover, caused it to invalidate a complex, thoroughly considered piece of socio-economic legislation, even though the justifications conceived by Chief Judge Mikva fall well within the range of "rough accommodations" (*Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70 (1913)) that the democratic process is entitled to make under rationality

review. Before Congress's judgment about the regulatory relevance of common ownership, control, or management is held unconstitutional, this Court's review is warranted.

1. This Court's precedents leave no question that a statute's rationality need not be tested only on the basis of a legislative or administrative record. Rather, as this Court has made clear:

> Where * * * there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," * * * because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing.

United States R.R. Retirement Bd. v. *Fritz*, 449 U.S. at 179; see *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 511 (1937); *Munn* v. *Illinois*, 94 U.S. 113, 132-133 (1877) ("For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed."). It is equally clear that where rationality review is undertaken, a "statutory distinction does not violate the Equal Protection Clause 'if any state of facts reasonably *may be conceived* to justify it.'" *Sullivan* v. *Stroop*, 496 U.S. at 485 (emphasis added) (quoting *Bowen* v. *Gilliard*, 483 U.S. 587, 601 (1987)); see *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61,

78 (1911). Based on those precedents, the constitutionality of the Cable Act "can be sustained by justifications in or out of the record." App., *infra*, 40a (separate opinion of Mikva, C.J.).

The court of appeals did not follow that principle in this case. To be sure, in its initial decision remanding the case to the FCC, the court purported to "assume" that a "conceivable basis," rather than an "articulated basis," would be sufficient to sustain the Cable Act. App., *infra*, 35a. That assertion, however, cannot be squared with the court's own observation that "[*o*]*n the record before us*, we fail to see a 'rational basis'" for the classification. *Id.* at 34a (emphasis added). It is also difficult to reconcile the majority's asserted fidelity to this Court's precedents with its decision to remand the case to secure "additional 'legislative facts'" from the FCC. *Id.* at 36a.

In addition, although Chief Judge Mikva concurred in the remand—to give the Commission the opportunity "to put the classifications in context" (App., *infra*, 44a)—he nonetheless suggested plausible justifications for the Cable Act's classification scheme. *Id.* at 41a-43a. The FCC, moreover, endorsed his analysis on remand. *Id.* at 50a. Yet, when the case was returned to the court in the wake of the remand, the majority refused even to consider the merits of those stated justifications. To the contrary, the majority rejected the plausible assumption that cable facilities serving separately owned buildings are more likely to resemble traditional cable systems, because it had "no basis for assuming this." *Id.* at 4a. The court then dismissed Chief Judge Mikva's other suggested justifications because "the FCC has wholly failed to flesh these out." *Ibid.* In short, because it

was unwilling to sustain the constitutionality of an Act of Congress based on what it regarded as "naked intuition," the court invalidated the Cable Act (47 U.S.C. 522(6)) on the ground that no rational basis exists for the "common ownership" requirement. App., *infra*, 4a.[9]

2. Contrary to the court's decision, the statute is rational. As Chief Judge Mikva noted, reasonable assumptions about the practical effect of the "common ownership" requirement upon consumer welfare are sufficient to sustain the classification at issue.[10] First,

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[9] The court's initial decision had also raised the question of the Act's disparate treatment of SMATV facilities that interconnect buildings by wire and those that use nonphysical transmission media. App., *infra*, 34a-36a. Following remand, however, the court declined to reach the constitutionality of that distinction (*id.* at 3a), and it is therefore not presented here.

[10] Indeed, Chief Judge Mikva's supposition—that cable facilities serving only commonly owned buildings are more likely to be less in need of regulation—is not merely plausible, but is implicit in the FCC's consistent pre-Cable Act policy of exempting facilities from regulation on that basis. The Commission's first cable regulations, promulgated in 1965, exempted from coverage "any * * * facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 741 (1965). With revisions not material here, the "private cable" exemption was retained by the Commission in subsequent proceedings. See, *e.g.*, *Second Report & Order in Docket Nos. 14895, 15233, & 15971*, 2 F.C.C.2d 725, 797, 799, 801 (1966); *Cable Television Report & Order*, 36 F.C.C.2d 143, 214 (1972); *First Report & Order in Docket No. 20561*, 63 F.C.C.2d 956, 990-997 (1977). And it was part of the Commission's regulations when the Cable Act was enacted in 1984. See 47 C.F.R. 76.5(a)(2) (1984).

it stands to reason that in contrast with facilities serving separately owned units, a requirement of common ownership, control, or management imposes a relative constraint upon the size of the market being served by the relevant SMATV facilities. The constraint on size gives each consumer of cable services greater leverage over the product supplied. Second, that leverage is likely to be enhanced by the fact that all of the consumers will be able to use their status as unit owners or tenants to bring common pressure to bear on a single set of owners or managers who provide or purchase all of a facility's service. See App., *infra*, 43a (separate opinion of Mikva, C.J.) ("Congress could have reasoned * * * that a SMATV facility serving buildings under common ownership is likely to be smaller, and the ability of residents to influence ownership is likely to be greater, so that the costs of regulation could outweigh the benefits.").[11]

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[11] It is assuredly true that some cable facilities serving commonly owned buildings will have more subscribers than some facilities serving separately owned buildings. However, it is equally true that "[i]n the area of economics and social welfare," a law does not violate equal protection principles "because the classifications * * * are imperfect." *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). This Court has often acknowledged the reality that "[t]he problems of government are practical ones and may justify * * * rough accommodations." *Ibid.*; see, *e.g.*, *City of Dallas* v. *Stanglin*, 490 U.S. 19, 27 (1989); *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 175. It has accordingly emphasized that a classification is not invalid under the rational-basis test merely because it "is not made with mathematical nicety." *Dandridge* v. *Williams*, 397 U.S. at 485; see also *Vance* v. *Bradley*, 440 U.S. 93, 108 (1979) (classification may be "to some extent both underinclusive and overinclusive"). As a matter of common sense, it is more likely that commonly owned buildings will constitute a smaller cable market in which each tenant will have a greater voice and more influence on management; thus, it cannot be said that "the varying treatment" of facilities serving commonly, as opposed to separately, owned buildings is "so unrelated to * * * any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. at 97.

3. As compared with the majority's insistence that legislative justifications be "fleshed out" on an administrative record, Chief Judge Mikva's reliance on reasonable "intuition" is far more consistent with this Court's applications of the rational-basis test. A few examples illustrate the point.

In *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 108 (1949), this Court reviewed a municipal ordinance prohibiting the placement of advertisements upon trucks, except for "business notices upon business delivery vehicles * * * engaged in the usual business or regular work of the owner and not used merely or mainly for advertising." The Court rejected an equal protection challenge alleging that the distinction between general advertisement and self-advertisement was "not justified by the aim and purpose" of reducing distractions. 336 U.S. at 109. In sustaining that classification, the Court reasoned:

> The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.

Id. at 110. In contrast with the majority's approach in this case, the Court's decision in *Railway Express* did not insist upon concrete "legislative facts" (App., *infra*, 36a) to support its supposition about "the nature and extent" of self-advertisements on vehicles. Nor did it have any administrative record to "flesh * * * out" (*id.* at 4a) its assumptions about the dissimilarity of the two pertinent kinds of advertising. Rather, because it was able to conceive of facts, the assumption of which would justify the classification, the Court sustained the law.

Similarly, in *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955), the Court upheld the rationality of an Oklahoma law that prohibited opticians from fitting or duplicating glasses without a prescription, but exempted sellers of "ready-to-wear" glasses. In rejecting the opticians' equal protection claim, the Court explained:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Id. at 489 (citations omitted). Applying those principles, the Court upheld the contested classification. *Ibid.* Contrary to the decision here, *Lee Optical* imputed rationality to the process of legislative line drawing when the evidence of record did not definitively foreclose the existence of plausible facts supporting it.

More recently, the Court in *Vance* v. *Bradley*, 440 U.S. 93 (1979), strongly reaffirmed that principle in rejecting an equal protection attack upon a statute requiring members of the Foreign Service to retire by the age of 60. In response to the plaintiffs' apparent contention that the classification could be sustained only upon submission of "empirical proof that health and energy tend to decline somewhat by age 60" (*id.* at 110), the Court responded:

> [T]his case, as equal protection cases recurrently do, involves a legislative classification contained in a statute. In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

Id. at 110-111. Finding the facts to be "arguable," the Court held that the legislative judgment reflected in the statute was "immun[e] from constitutional attack" under rationality review. *Id.* at 112.

The next year, in *United States R.R. Retirement Bd.* v. *Fritz*, *supra*, the Court upheld the Railroad Retirement Act of 1974, which prospectively eliminated a railroad retiree's ability to collect both social security and railroad retirement benefits. The case arose because the Act grandfathered dual benefits for those who had between 10 and 25 years of railroad employment, but only if the employee worked

for a railroad in 1974 or had a "current connection" with a railroad as of the transitional date of the Act (December 31, 1974) or the date of his actual retirement thereafter. 449 U.S. at 172-174. After reaffirming its general reluctance to invalidate a social or economic statute because it is "unwise or unartfully drawn" (*id.* at 175), this Court upheld the Act's "current connection" test on the ground that "Congress could assume that those who had a current connection with the railroad industry when the [Railroad Retirement] Act was passed in 1974, or who [had] returned to the industry before their retirement, were more likely than those who had left the industry prior to 1974 and who never returned, to be among the class of persons who pursue careers in the railroad industry, the class for whom the * * * Act was designed." 449 U.S. at 178. Because a plausible ground could be conceived for the challenged classification, the Court declined to overturn Congress's policy judgment—even though Congress's apparent factual assumptions were neither explicitly stated nor empirically verified.

This Court's decisions in *Railway Express*, *Lee Optical*, *Vance*, and *Fritz* faithfully apply the settled principle most recently reiterated in *Sullivan* v. *Stroop*—that an economic classification does not violate equal protection "if any state of facts reasonably may be conceived to justify it." 496 U.S. at 485.[12] The decisions of this Court, moreover, clearly

[12] For other decisions implicitly or explicitly applying that principle, see, *e.g.*, *Bowen* v. *Gilliard*, 483 U.S. 587, 599-600 (1987) (upholding statute reducing welfare payments for families receiving child support, based upon Congress's "assumption that child support payments * * * are generally beneficial to the entire family unit" and upon "the common sense proposition" that shared expenses reduce per capita cost of living with others); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 315-316 (1976) (upholding law requiring police to retire at age 50, because "[t]here is no indication that [the statute] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute"); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961) (sustaining exemption of products from prohibition against Sunday sales because "a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day," and because the record "is barren of any indication that this apparently reasonable basis does not exist").

instruct that, where economic legislation is involved and the rational-basis standard applies, a reviewing court must indulge the democratic process by crediting plausible, but unverified, assumptions and by relying on common sense, even when it is unsupported by legislative or administrative findings of fact. In contrast, the court of appeals never addressed the merits of the plausible, common sense justifications advanced in the separate opinion and endorsed by the FCC. Rather, it refused to "assume" unverified facts or to credit any rationale that was not "fleshed out" in an administrative record. In applying the rational-basis test inconsistently with this Court's decisions, the majority gave far too little weight to the presumption of validity that attaches to Acts of Congress under the rational-basis test, see, *e.g.*, *Lyng* v. *International Union, United Automobile Workers*, 485 U.S. 360, 370 (1988), and far too much weight

to its own conception of sound reasons for requiring cable franchising. App., *infra*, 34a-35a.[13]

4. "There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy." *Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963). But that judicial assault on democratic institutions ended long ago, when the Court returned "to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.* at 730; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 425 (1952) ("if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision"). For over a generation, this Court's decisions have proceeded from the central premise that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along

[13] Specifically, the majority emphasized that the use of public rights-of-way has been a traditional justification for allowing local franchising of cable, and that none of the facilities here uses any public right-of-way. See App., *infra*, 34a-35a. It is true that a cable facility's use of public rights-of-way has been a crucial determinant in allocating responsibility over cable to local governments. See, *e.g.*, *New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804, 808-811 (D.C. Cir. 1984). However, it is one thing to say that the use of public rights-of-way is a legitimate justification for requiring local franchising of cable services, and quite another to conclude (as the court of appeals did here) that there can be no other conceivable interest that will support a local franchising requirement.

suspect lines." *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976).

This philosophy of limited judicial power supplies the framework for evaluating socio-economic legislation, such as the Cable Act, under the equal protection component of the Due Process Clause of the Fifth Amendment. See, *e.g.*, *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 175-176; *Vance* v. *Bradley*, 440 U.S. at 102; *Flemming* v. *Nestor*, 363 U.S. at 611. Properly applied, the rational-basis test ensures that federal courts have "no power to impose * * * their views of what constitutes wise economic or social policy." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 175. Under that test, if there are "plausible reasons" (*id.* at 179) for a classification—that is, if "any state of facts reasonably may be conceived to justify it" (*Sullivan* v. *Stroop*, 496 U.S. at 485)—Congress's policy determinations prevail.

Given the plausible justifications set forth by the dissenting judge in this case and concurred in by the FCC, Congress's judgment about franchising facilities serving separately owned units was essentially "one of policy, and this kind of policy, under our constitutional system, ordinarily is to be 'fixed only by the people acting through their elected representatives.'" *Vance* v. *Bradley*, 440 U.S. at 102.[14] Con-

[14] As Chief Judge Mikva noted, "The Cable Act is a large and complex piece of socioeconomic legislation, an effort to establish a comprehensive regulatory scheme for the cable industry, a product of public hearings, private negotiations, and compromise. SMATV operators, the [respondents] in this suit, participated actively in the process and, in fact, did quite well." App., *infra*, 40a-41a. It is true that on the matter at issue here, respondents "lost a political battle in which

trary to the majority's decision, Congress's policy judgment does not have to be empirically justified to a federal court. A federal court's "responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than * * * 'pure speculation.'" *Id.* at 111. Legislatures, in short, are entitled to speculate when addressing regulatory problems, and the rational-basis test—properly applied—ensures that the judiciary will not unduly circumscribe such efforts.

Because the court of appeals invalidated an Act of Congress that easily satisfied the standard of rationality required by this Court's decisions, further review is warranted. There is, however, an additional reason to correct the court of appeals' error. Inasmuch as the D.C. Circuit's docket disproportionately involves complex regulatory schemes, it is particularly important that the court assess the validity of the classifications drawn by Congress under the appropriate standard of review. The court of appeals' published decision invalidating a provision of the Cable Act, 47 U.S.C. 522(6), as irrational cannot

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[they] had a strong interest." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 179. "[B]ut this is neither the first nor the last time that such a result will occur in the legislative forum" (*ibid.*), and "[t]he Constitution presumes that, absent some * * * antipathy [to the burdened parties], even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance* v. *Bradley*, 440 U.S. at 97.

be squared with this Court's decisions and therefore warrants further review.[15]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1992

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[15] We note that on October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992. That statute, however, does not affect the definition of "cable system" here at issue.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1089

BEACH COMMUNICATIONS, INC.,
MAXTEL LIMITED PARTNERSHIP,
PACIFIC CABLEVISION AND
WESTERN CABLE COMMUNICATIONS, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS

SPECTRADYNE, INC.,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
WIRELESS CABLE ASSOCIATION, INC.,
SOUTHWESTERN BELL CORPORATION AND
HUGHES COMMUNICATIONS GALAXY, INC.,
INTERVENORS

Petition for Review of an Order of the
Federal Communications Commission

[Filed June 9, 1992]

Upon Return of Record

Before: MIKVA, Chief Judge, EDWARDS and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed *Per Curiam*.

Dissenting opinion filed by Chief Judge MIKVA.

Per Curiam: This is our second decision on the instant petitition for review of an FCC rule, the Cable Definition Rule, promulgated pursuant to the Cable Act. In the first decision, *Beach Communications, Inc. v. FCC*, No. 91-1089 (D.C. Cir. Mar. 6, 1992) ("*Beach I*"), we remanded the record to the FCC. The record has now been returned. We hold that the Cable Act violates the equal protection component of the Fifth Amendment, insofar as it imposes a discriminatory franchising requirement, and vacate the Cable Definition Rule in relevant part.

The background of this case is explained in detail in *Beach I*, so we will not repeat it here. To briefly summarize, petitioners operate or plan to operate *external, quasi-private* SMATV facilities: where wires or other closed transmission paths interconnect separately-owned, controlled and managed multiple-unit dwellings, without those wires using public rights-of-way. The Cable Definition Rule construes the statutory term "cable system" to include such facilities, but to exclude both *internal* facilities (where wires do not interconnect separate buildings or use public rights-of-way) and *wholly private* facilities (where a single building or a group of commonly-owned, controlled or managed buildings are served, and the wires do not use public rights-of-way). Section 621(b)(1) of the Cable Act requires the operator of a "cable

system" to obtain a local franchise.[1] Petitioners challenge this requirement on equal protection grounds.

Beach I held that the Cable Act clearly defined an *external, quasi-private* SMATV facility as a "cable system." We also ruled that the minimum-scrutiny equal protection issue was ripe, and remanded the record for the FCC to consider whether some "rational basis" justified the distinction between this kind of facility and the facilities exempted by the Cable Definition Rule. The equal protection issue could not be avoided, we explained, because the Cable Act clearly excluded *wholly private* facilities from the definition of a "cable system." We left open the question whether that statutory term might be construed to include *internal* facilities that were not *wholly private*.

The FCC has now returned the record, and has failed to provide any justification for the challenged distinction. We therefore decide that the Cable Act is unconstitutional in part. Specifically, we decide that the statute violates the equal protection component of the Fifth Amendment insofar as it requires local franchises for *external, quasi-private* SMATV facilities and exempts *wholly private* facilities from this requirement. Thus, we need not consider whether differential regulation of *external, quasi-private* SMATV facilities and *internal* facilities is also unconstitutional. This latter issue would entail a fur-

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[1] More precisely, § 621(b)(1) states: "Except to the extent provided [by a grandfather clause], a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1) (1988). The terms "cable operator," "cable service" and "franchise" are defined in § 602 of the Cable Act.

ther, and now unnecessary, exercise in statutory construction.

We can conceive[2] of no reason why an *external, quasi-private* SMATV facility, but not a *wholly private* facility, should be subject to local cable franchising. Neither uses a public right-of-way.[3] Our colleague has suggested that an *external, quasi-private* facility is more "similar to a traditional cable system." *Beach I*, slip op. at 6 (Mikva, C.J., concurring in part and concurring in the judgment). We have no basis for assuming this. Furthermore, the mere impression of "similarity," without more, does not amount to a "rational basis." It does not amount to a reasoned justification in terms of *some* public purpose. To be sure, our colleague also offers putative justifications. *See id.* But the FCC has wholly failed to flesh these out, or to suggest some alternative rationale: "[T]he Commission . . . reports to the Court that it is unable to provide additional 'legislative facts,' beyond those provided by Judge Mikva in his concurring opinion." Report of Respondent Federal Communications Commission in Response to Opinion of March 6, 1992, at 1-2. We are now convinced that the impression of "similarity" is just that: a naked intuition, unsupported by conceivable facts or policies. *Cf. Zobel v. Williams*, 457 U.S. 55 (1982) (in-

[2] When applying the rational basis test, the Supreme Court has often stated that a classification may be sustained if any conceivable justification would support it. *See, e.g., Bowen v. Gilliard*, 483 U.S. 587, 601 (1987).

[3] As we have already explained at length, "[t]he fact that cable television uses public rights-of-way has been the predominant rationale for local franchising." *Beach I*, slip op. at 23.

validating as irrational an Alaska dividend program that distributed benefits proportionately to an adult state citizen's duration of residency).

There remains the question of remedy.

> Where a statute is defective because of underinclusion, . . . there exist two remedial alternatives: a court may either declare the statute a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.

Califano v. Westcott, 443 U.S. 76, 89 (1979) (internal quotations and brackets omitted).[4] The Court has further explained that, "[a]lthough the choice between extension and nullification is within the constitutional competence of a federal district court, . . . the court should not, of course, use its remedial powers to circumvent the intent of the legislature." *Heckler v. Mathews*, 465 U.S. 728, 739 n.5 (1984) (internal quotations omitted). But the Cable Act places a *burden* on petitioners rather than denying

[4] Overinclusive classifications "may of course be challenged as denying equal protection." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-4, at 1450 (2d ed. 1988). However, as far as we are aware, neither the Supreme Court nor the D.C. Circuit has explicitly addressed the problem of "extension" versus "nullification" as a remedy for the violation of equal protection by an overinclusive statute. Justice Harlan mentioned the problem in his *Welsh v. United States* concurrence, which is the source of modern remedial doctrine concerning underinclusive statutes. In passing, Harlan suggested that "cases of alleged 'overinclusion'" do not "present[] the remedial problem that arises in [an underinclusion] case.'" *Welsh v. United States*, 398 U.S. 333, 363 n.15 (1970) (Harlan, J., concurring in the result).

them *benefits*, and is *overinclusive* rather than *underinclusive* in that this burden does not serve the Act's purposes. Assuming, *arguendo*, that "extension" (extending the franchise requirement to include *wholly private* facilities) rather than "nullification" (exempting *external, quasi-private* SMATV facilities from that requirement) remains within our "constitutional competence," we would have no basis for choosing "extension." Such a remedy would surely circumvent Congress's intent, because *neither* kind of facility uses a public right-of-way.

Rather, we avoid the franchise requirement, insofar as it covers petitioners and similarly situated SMATV operators. The severability provision at 47 U.S.C. § 608 (1988), which governs the Cable Act, authorizes this narrowly focussed remedy: "If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby." Specifically, we declare that the operators of *external, quasi-private* SMATV facilities are not required to obtain franchises pursuant to § 621(b)(1) of the Cable Act,[5] as the Act currently stands, and we direct the FCC to amend the Cable Definition Rule accordingly.

If we have misunderstood congressional intent in our construction of the Act and its underlying pur-

[5] Petitioners do not challenge any feature of the Cable Act except the franchise requirement in § 621(b)(1). We need not decide at this point whether other statutory requirements for "cable systems," including *external, quasi-private* SMATV facilities, are severable from this one. *See, e.g.*, 47 U.S.C. § 559 (1988) (prohibiting transmission of obscene matter over any "cable system").

poses, we have no doubt that Congress will act to remedy the situation.[6]

MIKVA, *Chief Judge, dissenting*: For the reasons expressed in my concurring opinion in *Beach Communications, Inc. v. FCC*, No. 91-1089 (D.C. Cir. Mar. 6, 1992), I dissent.

[6] The FCC has advised:

> The Court should be aware that significant cable legislation is before Congress now, *see, e.g.*, H.R. 4850, 102d Cong., 2d Sess. (1992), and that Congress in the context of considering that legislation will have an opportunity to revise the definitional provisions of the 1984 Act if it chooses. Some interested parties have brought the Court's decision in this case to the attention of the relevant committees and have suggested legislative language to address the equal protection question identified in the majority opinion in this case.

Report of Respondent Federal Communications Commission in Response to Opinion of March 6, 1992, at 7.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1089

BEACH COMMUNICATIONS, INC.,
MAXTEL LIMITED PARTNERSHIP,
PACIFIC CABLEVISION AND
WESTERN CABLE COMMUNICATIONS, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS

SPECTRADYNE, INC.,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
WIRELESS CABLE ASSOCIATION, INC.,
SOUTHWESTERN BELL CORPORATION AND
HUGHES COMMUNICATIONS GALAXY, INC.,
INTERVENORS

Petition for Review of an Order of the
Federal Communications Commission

[Filed Mar. 6, 1992]

Before: MIKVA, *Chief Judge*, EDWARDS and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

Separate concurring statement filed by *Chief Judge* MIKVA.

EDWARDS, *Circuit Judge*: This case involves a challenge to a Federal Communications Commission ("FCC" or "Commission") construction of the Cable Communications Policy Act of 1984 ("Cable Act"). According to the FCC, the Cable Act covers Satellite Master Antenna Television ("SMATV") facilities with wires interconnecting separately owned, controlled and managed multiple-unit dwellings, even when the wires do not use public rights-of-way. SMATV companies petition for review, arguing that the Commission has misinterpreted the statute, and that local franchising (as may be required pursuant to the Cable Act) violates their First Amendment and equal protection rights.

We reject petitioners' statutory challenge, for the plain language of the Cable Act defines the disputed SMATV facilities as "cable systems," and that definition is consistent with the legislative history as well as the preexisting regulatory regime.

As for petitioners' First Amendment claim, we find it unfit for judicial decision under *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and therefore unripe. The Cable Act requires every cable operator to have a local franchise, but gives each locality the discretion to create its own franchising regime. We cannot find the statute unconstitutional on its face, because we do not know whether con-

ditions in any given locality will justify a burden on petitioners' speech, nor do we know what kind of burden will need to be justified, nor the appropriate First Amendment standard. Thus, we cannot assess any claim of First Amendment infringement absent an as-applied challenge to some specific franchising requirement. Since petitioners present no such claims in this appeal, we dismiss this portion of the case as unripe.

We cannot dispose of petitioners' equal protection challenge so easily, for it raises a "purely legal" issue that is ripe for judicial review and, also, poses a serious constitutional problem. Normally, in considering the constitutionality of a statute, we seek a reasonable reading that avoids constitutional infirmities. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988). Here, however, we face seemingly insurmountable difficulties in achieving this goal. Under the FCC's construction of the Cable Act, a video transmission facility is not a "cable system" if the facility's wires are internal to multiple-unit dwellings, or if the interconnected buildings are commonly owned, controlled or managed and the wires do not use public rights-of-way. We see no "rational basis" for the distinction between these two types of exempted facilities and SMATV facilities that interconnect separately owned, controlled and managed buildings without using rights-of-way. Absent some rational basis for this statutory distinction, petitioners' equal protection challenge may have merit. Because the record is lacking on this point, we remand for supplementation by the FCC.

I. BACKGROUND

The traditional cable television system receives signals at a remote location and transmits them throughout a community via a network of wires that use local rights-of-way. The Cable Act provides the framework for local franchising of this sort of system. SMATV is smaller than traditional cable systems, for it usually involves a single building or building complex that is wired to a satellite antenna. The question here is whether the Cable Act covers a SMATV facility located wholly on private property and, if so, whether the Constitution permits such coverage. The regulatory history of cable franchising helps clarify this question, and we briefly review it.

Prior to the Cable Act, the FCC regulated cable television without a specific governing statute. The Commission had evolved a dual regime for "cable systems," which were defined as:

> non-broadcast facilit[ies] consisting of a set of transmission paths and associated signal generation, reception, and control equipment . . . but such term shall not include . . . any such facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control, or management.

47 C.F.R. § 76.5(a) (1984). State and local governments were given the task of franchising cable systems, while the FCC had exclusive jurisdiction over signal carriage, technical standards and other operational matters. *See generally New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 807-11 (D.C. Cir. 1984) (general history of dual regime). This was so because "conventional licens-

ing would [have] place[d] an unmanageable burden on the Commission. Moreover, local governments are inescapably involved in the process because cable makes use of streets and ways . . . ." *Cable Television Report & Order*, 36 F.C.C.2d 143, 207 (1972).

The FCC's original definition of cable systems included the so-called "private cable" exemption, for facilities that served "only subscribers in one or more multiple unit dwellings under common ownership, control, or management." This provision was originally designed for Master Antenna Television ("MATV") systems, which receive and redistribute normal broadcast signals. On its face, 47 C.F.R. § 76.5(a) exempted two kinds of MATV systems. The first was a system where the wires were confined to a single multiple-unit dwelling: for example, a MATV antenna on the roof of an apartment house, wired only to apartments in that building. The second was a system where the wires connected a group of buildings that were commonly owned, controlled or managed: for example, a MATV facility for a single apartment complex. Conversely, the language did *not* cover a system interconnecting apartment buildings that were separately owned, controlled or managed. And, indeed, the FCC interpreted its definition of a "cable system" to exempt the first two kinds of MATV facilities, and to include the third. *See generally In re Amendment of Part 76*, 54 F.C.C. 2d 824, 826-27 (1975) (notice of rulemaking); *In re Amendment of Part 76*, 63 F.C.C.2d 956, 990-97 (1977).

During this pre-Cable Act period, new alternatives to traditional cable television began to emerge. One such alternative was SMATV; another was multi-

point distribution ("MDS") via microwaves. In 1978, the FCC preempted local franchising of a MDS system that beamed microwaves from the Empire State Building to rooftop antennae. *See In re Orth-O-Vision*, 69 F.C.C.2d 657 (1978), *reconsideration denied*, 82 F.C.C.2d 178 (1980), *review denied sub nom. New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982). Several years later, in *In re Cable Dallas, Inc.*, 93 F.C.C.2d 20 (1983), the FCC decided that a SMATV system serving a "cluster[] of apartment buildings, . . . composed of buildings not under common ownership, management, or control," *id.* at 21, was a "cable system." However, the Commission ruled that the franchising of a single-building SMATV system was preempted. *See In re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983), *aff'd sub nom. New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984). In the latter ruling, the FCC stated that "SMATV systems which are defined as cable television systems by this Commission are not under scrutiny here," 95 F.C.C.2d at 1224 n.3, and this circuit noted the proviso in affirming the Commission, *see New York State Comm'n*, 749 F.2d at 807 n.1.

Although the FCC did not say so explicitly, the pattern of decisions in *Orth-O-Vision*, *Cable Dallas* and *Earth Satellite Communications* was consistent with the pattern for MATV. A MDS or SMATV facility for multiple-unit dwellings was a "cable system" if and only if the wires were "external" (*i.e.*, served to connect separate buildings) and the interconnected buildings were not commonly owned, controlled or managed.

Congress promulgated the Cable Act to establish, *inter alia*, "a national policy concerning cable communications," "guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems," and "franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521 (1988). Section 621(b)(1) of the Act requires every cable operator to have a local franchise,[1] and section 602(6) defines a "cable system" as follows:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . . (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way.

47 U.S.C. § 522(6) (1988); *see also* 47 C.F.R. § 76.5 (a) (1990) (same definition). This definition incorporated *verbatim* the Commission's prior "private cable" provision, with one important change: the final proviso that a facility is exempted "unless such facility or facilities uses any public right-of-way."[2]

The right-of-way proviso, on its face, makes the use of public rights-of-way a *sufficient* condition for a "cable system," not a *necessary* condition. However, the FCC initially interpreted § 602(6) to mean that "[w]hen multiple unit dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not the ownership, control or management." *In re Amendment of Parts 1, 63 & 76*, 104 F.C.C.2d 386, 396-97 (1986), *modifying on other grounds Implementation of the Provisions of the Cable Communications Policy Act of 1984*, 50 Fed. Reg. 18,637 (1985). Soon thereafter, the FCC reconsidered the meaning of § 602(6). *See Definition of a Cable Television Sys.*, 54 Fed. Reg. 14,253 (1989) (notice of rulemaking). After hear-

[1] "Except to the extent provided [by a grandfather clause], a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1) (1988). A franchise is defined as "an initial authorization, or renewal thereof . . . , issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system." 47 U.S.C. § 522(8) (1988). A "franchising authority" is "any governmental entity empowered by Federal, State, or local law to grant a franchise." *Id.* § 522(9). We use the term "local franchise" to mean "franchise from a franchising authority." *See* H. REP. No. 934, 98th Cong., 2d Sess. 45 (1984) ("In several states . . . the franchising process includes approval of a franchise by a state agency as well as by a local government. [Congress] intends that in such cases the term 'franchising authority' shall include these state agencies, in addition to any local government body with authority to grant a franchise, including a military authority if authorized to grant such a franchise.").

[2] The Cable Act also omitted the phrase "will serve" from the regulatory exemption, which had covered a "facility that serves or *will serve* only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management" (emphasis added).

ing comments from interested parties, the FCC issued a new interpretation. *See In re Definition of a Cable Television Sys.*, 5 F.C.C. Rcd. 7638 (1990).[3]

The rulemaking covered video transmission facilities for multiple-unit dwellings.[4] A "cable system" is defined by § 602(6) as using a "closed transmission path[]," and the FCC decided that this term included only wire and other *physical* connections, not the microwave transmission used by MDS. *See id.* at 7638-39. Moreover, a facility would "use[] any public right-of-way" for purposes of the proviso in § 602(6)(B) only if a wire or some other "closed transmission path" impinged upon the right-of-way. *See id.* at 7641-42. The FCC then considered whether a video facility would constitute a "cable system," even if its "closed transmission paths" did not transect rights-of-way. Here, the Commission relied upon the plain language of § 602(6)(B) as well as its regulatory history.

> [The FCC's decisions prior to the Cable Act] made clear that the use of wire or cable within the confines of a multi-unit building is not sufficient to bring the service within the jurisdictional bounds of a 'cable' system. . . . [Where] buildings were connected by radio alone, the Commission did not treat the facilities as cable systems, even where the buildings were not commonly-owned

[3] *See also Definition of a Cable Television Sys.*, 56 Fed. Reg. 1931 (1991) (summary of rulemaking).

[4] The FCC already had considered whether the Cable Act covers a facility for single-unit dwellings, e.g., a SMATV system for a mobile home park or a complex of vacation homes. *See In re Mass. Community Antenna Television Comm'n CSR-2997*, 2 F.C.C. Rcd. 7321 (1987).

> and thus were not within the exemption for multiple-unit dwellings.

Id. at 7640. Conversely,

> [w]here . . . buildings are interconnected by closed transmission paths, Commission precedent and the plain language of the statutory exemption make clear that the services must be considered cable systems unless (1) the buildings are commonly owned, controlled, or managed and (2) the facilities do not use any public rights-of-way.

Id. at 7641 (citation omitted).

Thus, the FCC adopted the following "general principles . . . [that] should provide ample guidance in interpret[ing]" § 602(6).

> [F]acilities must be interconnected by physically closed or shielded transmission paths to meet the statute's threshold requirement for a cable system. Use of radio or infrared transmissions alone does not meet this threshold criterion. The use of wire or cable exclusively within the premises of multiple unit buildings . . . also does not fall within the statutory definition. . . . However, where a wire or cable is used to interconnect MATV or SMATV equipped buildings, the system is a cable facility unless the several buildings are commonly owned, controlled, or managed and the system's physically closed interconnection paths do not use a public right of way.

Id. at 7642-43. We will refer to this set of principles as the "Cable Definition Rule."[5]

[5] The word "rule" is not meant to imply that *In re Definition of a Cable Television System* creates a substantive rule. For

The instant case is a petition for review of the Cable Definition Rule. The petitioners are SMATV companies, and their facial challenge is focused on one aspect of the rule: that a SMATV facility with wires or other closed transmission paths interconnecting separately-owned, controlled and managed multiple-unit dwellings, without those wires using public rights-of-way, is a "cable system." We will call this kind of SMATV facility an "*external, quasi-private*" facility.[6] Conversely, we use the term "*internal*" to mean a facility where wires do not interconnect separate buildings or use public rights-of-way, and "*wholly private*" to mean a facility that serves a single building or a group of commonly-owned, controlled or managed buildings and the facility's wires do not use public rights-of-way.[7] The *internal* and *wholly private* systems are the two kinds of facilities that are *not* cable systems under the Cable Definition Rule. Petitioners argue that the Commission has incorrectly interpreted § 602(6) to cover *external quasi-private* SMATV, and that the Cable Definition Rule violates their First Amendment and equal protection rights by requiring them to obtain local franchises.[8]

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purposes of this petition, we need not decide whether the FCC's "general principles" are interpretative or substantive.

[6] Petitioners have standing because they currently operate *external, quasi-private* SMATV facilities or have concrete plans to operate such facilities.

[7] The two categories are not mutually exclusive.

[8] The FCC did not address these constitutional issues in proposing or promulgating the Cable Definition Rule. Petitioners need not have raised the issues below. *See Northwestern Ind. Tel. Co. v. FCC*, 872 F.2d 465, 470 n.3 (D.C. Cir. 1989) (no exhaustion requirement for facial constitutional challenge to FCC action), *cert. denied*, 493 U.S. 1035 (1990).

Petitioners do not challenge any feature of the Cable Act or FCC regulations except local franchising. Specifically, they do not challenge any direct federal requirement for cable systems.

II. Analysis

A. *The Statutory Challenge*

We reject petitioners' statutory challenge to the Cable Definition Rule. Section 602(6) of the Cable Act *does* cover an *external, quasi-private* SMATV system. This finding concludes our inquiry on the statutory challenge, because, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). It is true that the Cable Definition Rule raises a special case, because the rule poses a serious equal protection problem. *See* section II.B.2. *infra*. And, normally, a court is obliged to construe a statute to avoid constitutional problems. *See DeBartolo*, 485 U.S. at 575. The difficulty here is that there is no reasonable alternative construction for the disputed language in the statute; and we have no authority to ascribe a construction to a statute that is "plainly contrary to the intent of Congress." *Id.* As the FCC found, the plain language of § 602(6) defines an *external, quasi-private* SMATV facility as a "cable system," and the legislative history does not contradict this plain meaning.

Section 602(6) has a definitional clause and then the private-cable exemption, § 602(6)(B). The defi-

nitional clause reads as follows: "the term 'cable system' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. § 522(6) (1988). It is clear that this definitional clause covers *external, quasi-private* SMATV. Petitioners do not dispute that an *external, quasi-private* SMATV facility has "closed transmission paths," as well as the "associated . . . equipment," and is "designed to provide cable service which includes video programming." Rather, they argue that such a facility does not provide cable service "to multiple subscribers within a community," because *external, quasi-private* SMATV serves only the residents of a particular group of buildings, not the entire locality. But the definitional clause is not reasonably interpreted to require that a "cable system" must interconnect a whole "community." The words "within a community" do not support this interpretation, whatever else they mean. Otherwise, a cable operator could evade the Cable Act by neglecting to wire some small fraction of local dwellings. Moreover, petitioners' reading of the definitional clause makes surplusage of the private-cable exemption. A "facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management," 47 U.S.C. § 522(6)(B) (1988), will rarely, if ever, comprise the entire "community."

Thus, an exemption for *external, quasi-private* SMATV cannot fairly be ascribed to the definitional clause of § 602(6). Nor can it be ascribed to the private-cable exemption. Petitioners' argument, here,

is that the phrase "under common ownership, control, or management" should be read to mean that, as long as each apartment building is *itself* under common ownership, control or management, the *complex* of buildings need not be commonly owned, controlled or managed. The problem with this reading of the private-cable exemption is that it completely distorts the literal terms of the statute.

Because the plain language of § 602(6) covers *external, quasi-private* SMATV, legislative history has little weight.[9] As we stated in *American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988): "The general interpretive principle—a reluctance to rely upon legislative history in construing an *unambiguous* statute—is of especial force where, as here, resort to legislative history is sought to support a result *contrary* to the statute's express terms." 823 F.2d at 1568 (emphasis in original). To be sure, this interpretive principle does not apply if "the plain language of the statute would be lead to blatantly absurd consequences." *Avco*

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[9] Petitioners also argue that the structure of the Cable Act precludes the FCC's interpretation of § 602(6), or at least makes that provision ambiguous. However, their argument is frivolous. First, they point to § 621(a)(2), which states that "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way." 47 U.S.C. § 541(a)(2) (1988). But this provision surely does not imply or require that cable systems use rights-of-way. Second, petitioners claim that § 621(a)(3), the "redlining" provision, requires the cable operator to wire an entire community. In *American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988), we specifically rejected this claim: "The [provision] on its face prohibits discrimination on the basis of income; it manifestly does not require universal service." 823 F.2d at 1580.

Corp. v. United States Dep't of Justice, 884 F.2d 621, 624 (D.C. Cir. 1989) (internal quotations omitted). But the plain reading of § 602(6) involves no "blatant absurdity." Another provision of the Cable Act, § 621(e), makes clear that the language of § 602(6) was not inadvertent:

> Nothing in this [Act] shall be construed to affect the authority of any State to license or otherwise regulate any facility or combination of facilities which serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management and which does not use any public right-of-way.

47 U.S.C. § 541(e) (1988). And the plain reading of § 602(6) is made fully intelligible by the regulatory history predating the Cable Act, which we described in section I. *supra*. The presence of "external" wires, interconnecting separately-owned buildings, had long been a defining characteristic of "cable systems." *See City of New York v. FCC*, 486 U.S. 57, 66-70 (1988) (relying on regulatory background of Cable Act to interpret statutory provision).

Nor is this that "rare case[] in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters," as demonstrated by "some clear indication of congressional intent . . . in the legislative history." *Consolidated Rail Corp. v. United States*, 896 F.2d 574, 578 (D.C. Cir. 1990) (internal quotations omitted). First, there is legislative history that supports the FCC. Section 634, the equal employment opportunity provision, states that "[f]or purposes of this section, the term 'cable operator' includes any operator of any

satellite master antenna television system." 47 U.S.C. § 554(h)(1) (1988). The House committee report notes: "Subsection (h) provides that operators of satellite master antenna television systems (SMATV) are subject to the requirements of this section, whether or not such systems only serve commonly owned apartment units without crossing public rights of way." H. REP. No. 934, 98th Cong., 2d Sess. 93 (1984) ("*House Report*"). This passage implies that § 602(6) does not exempt *external, quasi-private* SMATV systems.

Petitioners adduce other excerpts from the legislative history; however, these excerpts are at best ambiguous. In general, petitioners fail to distinguish between the "core" meaning of terms like "cable television" or "SMATV," and less paradigmatic meanings. The core meaning of "cable television" is a system that interconnects an entire locality, transecting local rights-of-way. *See* 129 CONG. REC. 15,590 (1983) (statement of Senator Hollings during Cable Act debate) ("[cable] cannot operate without crossing city streets"). The core meaning of "SMATV" is a system located wholly on private property, serving a single building or a commonly-owned complex. *See* S. REP. No. 67, 98th Cong., 1st Sess. 18-19 (1983) ("*Senate Report*") ("The second exemption [in the Senate's version of § 602(6)] is for a facility . . . that serves only subscribers in one or more [multiple-unit] dwellings under common ownership, control, or management. These are the so-called private cable systems, or master antenna television (MATV) or satellite master antenna television (SMATV) systems."). General descriptions of Congress' purpose that contrast "cable" with "SMATV"—for example, the statement in the *Senate Report* that "cable faces major

competition from such sources as MDS, MATV, SMATV, DBS, STV, television, radio . . . and other media" [10]—surely use the two terms in their core meanings. And even specific commentary on § 602 (6) (B) may be interpreted as using the core meaning of "SMATV." The *House Report* specifies:

> There are four specific exemptions to the term 'cable system' . . . [*inter alia*] a facility or combination of facilities that serves only subscribers in one or more multiple unit dwellings (in other words, a satellite master antenna television system), unless such facility or facilities use a public right-of-way . . . .

House Report at 44. The foregoing excerpt arguably might support petitioners. However, it is also possible that the phrase "under common ownership, control, or management" was omitted inadvertently, or assumed to be part of the definition of a "satellite master antenna television system." [11]

In short, the express terms of the Cable Act cannot reasonably be construed to exempt *external, quasi-private* SMATV facilities. The definitional clause of § 602(6) plainly covers such facilities; the private

[10] *Senate Report* at 30; *see also id.* at 5 (similar contrast between "cable" and "SMATV"); *House Report* at 22 (same); *id.* at 22-23 (same).

[11] Similarly, the *House Report* states: "Section 621(e) clarifies that this bill does not affect the authority of a state or political subdivision to license or regulate an SMATV system which does not use public right[s]-of-way." *House Report* at 63. Again, the omission of "under common ownership, control, or management" could be inadvertent, or the statement could be using the core meaning of "SMATV system."

cable exemption, § 602(6)(B), plainly does not. This plain meaning is neither absurd, nor contradicted by the legislative history. Thus, we must consider petitioners' constitutional challenges.

B. *The Constitutional Challenges*

1. *First Amendment*

At the outset, we acknowledge that a First Amendment problem is posed. "Cable television . . . is engaged in 'speech' under the First Amendment," *Leathers v. Medlock*, 111 S.Ct. 1438, 1442 (1991), and § 621(b)(1) imposes a burden on that speech. Respondents argue that the provision is no burden at all—that it merely *permits* local franchising—but this argument is unpersuasive. By its plain language, § 621(b)(1) creates an obligation for cable operators. As the Commission itself has stated, "[s]ection 621(b)(1) of the Cable Act requires that a firm seeking to construct and operate a cable television system must first obtain a franchise from the state government or its local designate." *In re Competition*, 5 F.C.C. Rcd. 362, 366 (1989); *see also House Report* at 59 ("[u]nder subsection 621(b), no cable operator may provide cable service without a franchise issued by a state or a franchising authority"); *Senate Report* at 19 ("[Senate version of § 621(b)] provides that no cable system shall provide . . . cable service without a cable franchise"). Thus, by virtue of § 621(b)(1), the Cable Definition Rule obliges petitioners to obtain local franchises for their *external, quasi-private* SMATV systems.

However, as respondents correctly argue, neither the FCC nor Congress has fully *defined* this obligation. The Cable Act creates a franchise requirement,

but gives localities broad discretion to determine the substance and process of franchising. The Act permits but does not require exclusive franchising: "A franchising authority may award . . . 1 or more franchises within its jurisdiction." 47 U.S.C. § 541 (a)(1) (1988); *see also House Report* at 59 ("[t]his provision grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area"); *In re Competition*, 5 F.C.C. Rcd. at 366 (Cable Act "allows, but does not require, the franchising authority to grant more than one franchise to serve the same community"). Similarly, the Act does not generally require that localities impose special duties on franchisees,[12] but simply permits localities to regulate cable rates, *see* 47 U.S.C. § 543 (1988), set aside public channels, *see id.* § 531, or levy a franchise fee, *see id.* § 542. And, in general, the statute gives only minimum specifications for franchising procedures.[13] In short, a locality could adopt a

[12] One exception is the "redlining" provision: "In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." 47 U.S.C. § 541(a)(3) (1988).

[13] Section 626 does partially specify a procedure for franchise renewals. *See* 47 U.S.C. § 546 (1988). However, subsection (h) states that "[n]otwithstanding [these specifications], a cable operator may submit a proposal for the renewal of a franchise pursuant to this subsection at any time, and a franchising authority may, after affording the public adequate notice and opportunity for comment, grant or deny such proposal at any time." *Id.* § 546(h). Section 625 partially specifies a procedure for franchise modifications. *See* 47 U.S.C. § 545 (1988).

summary process for franchising *every external, quasi-private* SMATV facility, and local SMATV operators could discharge their § 621(b)(1) obligation by complying with this process. Such a franchising regime would pose very different First Amendment problems than a costly, exclusive-franchising system.

Because localities have discretion to define the § 621(b)(1) duty, and because the justification for that duty will depend on local facts, petitioners' First Amendment challenge is unripe. We test the ripeness of this facial, pre-enforcement challenge to an agency action by balancing two factors: the "fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967).[14]

In this case, our treatment of the "fitness" question is similar to the standard treatment of a facial challenge where the federal agency itself has discretion. As we noted in *Action Alliance of Senior Citi-*

[14] "Generally, in ascertaining whether a suit is ripe, courts must balance the petitioner's interest in prompt consideration of allegedly unlawful agency action against the agency's interest in crystalizing its policy before that policy is subjected to judicial review and the court's interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *Payne Enters. v. United States*, 837 F.2d 486, 492 (D.C. Cir. 1988) (internal quotation omitted). And, "under the ripeness doctrine, the hardship prong of the *Abbott Laboratories* test is not an independent requirement divorced from the consideration of the institutional interests of the court and agency." *Id.* at 493. Thus, if a "matter is clearly fit to be heard, we need not consider whether petitioners would suffer any hardship from our postponing its resolution." *Consolidated Rail Corp. v. United States*, 896 F.2d 574, 577-78 (D.C. Cir. 1990).

zens v. Heckler, 789 F.2d 931 (D.C. Cir. 1986), a "facial, purely legal challenge is both more difficult and less worthwhile when the prescription challenged is discretionary. To hold the provision invalid on its face, a court would have to conclude that the provision stands in conflict with the statute regardless of how the agency exercises its discretion." *Id.* at 941. Here, it is localities that have the discretion, not the FCC, but the same principle applies. In short, we "believe that judicial appraisal" of the First Amendment issue "is likely to stand on a much surer footing in the context of a specific application of [the Cable Definition Rule] than would be the case in the framework of the generalized challenge made here." *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967).[15]

First, we will benefit from postponing review until an as-applied challenge because the First Amendment analysis depends on the local franchising regime. Different regimes will impose different burdens, which may or may not be justifiable under the First Amendment. Moreover, the judicial standard for evaluating the justification will vary with the regime. This standard depends on:

> whether, in the case of a regulation of activity which combines expressive with nonexpressive elements, the regulation aims at the activity or the expression; whether the regulation restricts speech itself or only the time, place, or manner of speech; and whether the regulation is in fact content-based or content-neutral.

[15] Although a First Amendment overbreadth challenge would not be context-dependent, petitioners have not presented such a challenge. We offer no views on the likely success of such a challenge.

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 112 S.Ct. 501, 514-15 (1991) (Kennedy, J., concurring in judgment) (citations omitted). A particular local franchising system may impose only an "incidental" burden on the speech of SMATV operators, and thereby trigger the so-called *O'Brien* test, *see United States v. O'Brien*, 391 U.S. 367, 377 (1968); or, alternatively, the franchising system may impose "direct" burdens that require stricter First Amendment scrutiny. *Cf. Century Communications Corp. v. FCC*, 835 F.2d 292, 298 (D.C. Cir. 1987) (declining to decide "precise level of first amendment protection due a cable television operator," and applying *O'Brien* as minimum standard), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988); *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1454 (D.C. Cir. 1985) (same), *cert. denied*, 476 U.S. 1169 (1986).

Second, the court reviewing an as-applied challenge will have specific information about the local conditions that might justify SMATV franchising. "[W]hether the means chosen are congruent with the desired end" for purposes of *O'Brien* or a stricter First Amendment test is a "delicate fact-bound issue." *Century Communications*, 835 F.2d at 298. In *City of Los Angeles v. Preferred Communications*, 476 U.S. 488 (1986), a disappointed applicant for a cable television franchise had sued Los Angeles, claiming that the city's exclusive-franchise regime violated the First Amendment. The Supreme Court allowed the applicant to pursue his complaint, but refused to reach the merits of the First Amendment issue without further factual development.

> The City has adduced essentially factual arguments to justify the restrictions on cable fran-

> chising imposed by its ordinance, but the factual assertions of the City are disputed at least in part by respondent. We are unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings . . . .

Id. at 494.

To be sure, the "fitness of the issues for legal decision" is only the first factor in the *Abbott Laboratories* calculus. If, as here, we find a case unfit for review, then we must weigh the "hardship to the parties of witholding court consideration." Hardship depends, in part, on whether the Cable Definition Rule is "interpretative" or "substantive." *See* ACLU, 823 F.2d at 1576-79. Assuming, *arguendo*, that the rule is substantive, it has a direct effect on petitioners' "primary conduct." *Toilet Goods*, 387 U.S. at 164. The operators of *external, quasi-private* SMATV facilities may well submit to local franchising so as to avoid federal enforcement action. "The paradigmatic hardship situation is where a petitioner is put to the choice between incurring substantial costs to comply with allgedly unlawful agency regulations and risking serious penalties for non-compliance." *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 166 (D.C. Cir. 1988). Here, noncompliance entails a risk of civil or even criminal penalties. *See* 47 U.S.C. § 503 (1988) (forfeiture penalty for violating title 47, chapter 5); *id.* § 501 (1988) (criminal penalty for violating title 47, chapter 5).

On the other hand, it is unclear whether petitioners will incur "substantial" costs by franchising their systems, because the cost depends on the local franchising regime. Any regime will impose some burden

on petitioners' speech, and that *is* a higher "cost" for purposes of *Abbott Laboratories* than mere monetary expense,[16] but the First Amendment burden may be "incidental." Moreover, it is possible that petitioners might avoid the Hobson's choice between compliance and the risk of enforcement by bringing an anticipatory, as-applied challenge. Since the First Amendment issue is wholly unfit for judicial decision, petitioners' hardship is not so substantial as to require immediate decision. On balance, their First Amendment challenge is unripe.

2. *Equal Protection*

Petitioners also raise a Fifth Amendment equal protection challenge to the Cable Definition Rule. They claim that the franchising requirement for *external, quasi-private* SMATV fails the "fundamental rights" equal protection scrutiny accorded statutes infringing speech, *see, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972); and, in the alternative, that the requirement fails the economic "rational basis test," *see, e.g., Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). Under either test, petitioners argue, there is no adequate justification for discriminating between *external, quasi-private* SMATV and the exempted *internal* and *wholly private* facilities.[17]

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[16] *See United Christian Scientists v. Christian Science Bd. of Directors*, 829 F.2d 1152, 1160 n.29 (D.C. Cir. 1987) (*Abbott Laboratories* hardship "is especially pressing here in view of the fact that the activity inhibited involves not merely business but also speech and religious exercise").

[17] We cannot avoid the equal protection challenge, because the Cable Act cannot reasonably be construed to define *wholly*

At this point, it appears that the distinction in the Cable Act between *external, quasi-private* SMATV and the exempted facilities may violate the minimal equal-protection test. As noted below, we will direct the FCC to consider whether some "rational basis" justifies the distinction. If the FCC is unable to provide a "rational basis," then we will decide without more that the Cable Definition Rule violates the equal protection component of the Fifth Amendment. However, if the FCC *does* furnish a "rational basis," and we conclude that the Cable Definition Rule satisfies the minimal test, we will need to consider whether a heightened-scrutiny equal protection challenge is ripe. For now, however, we need not address the "fundamental rights" claim, because the "rational basis" claim is ripe and apparently valid.

Unlike petitioners' First Amendment claim, the "rational basis" claim does not depend on particular circumstances. First, the *standard* for evaluating that claim does not vary with local conditions. "At the minimum level, this Court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate govern-

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private facilities as "cable systems." The private cable exemption, § 602(6)(B), plainly states that a facility serving a single multiple-unit dwelling or a complex of buildings that are commonly owned, managed or controlled is not a "cable system" unless the facility uses a right-of-way. We need not decide at this point whether *internal* facilities that are *not wholly private* (e.g., a MDS facility serving a group of separately-owned, controlled and managed buildings) might be "cable systems" under a reasonable construction of § 602(6). *DeBartolo* will require us to address that question only if the FCC provides a "rational basis" for the distinction between *external, quasi-private* SMATV and *wholly private* facilities, but not between *external, quasi-private* SMATV and *internal* facilities.

mental objectives." *Schweiker*, 450 U.S. at 230. Whatever the features of the local franchising regime —whether it imposes an "incidental" or "direct" burden on petitioners—the exemption for non-burdened facilities must meet this minimum standard.

Second, the *application* of that standard is also context-invariant. If some *external, quasi-private* SMATV operator were to raise an as-applied, rational-basis challenge to local franchising, the relevant question would *not* be whether SMATV franchising was "rationally related to a legitimate government purpose" *in that locality*. Rather, the reviewing court would seek some rational relation *as a general matter*. "Insistence on a tight fit between legislative means and ends is called for only when Congress acts along suspect (or semi-suspect) lines or in contravention of fundamental liberties . . . ." *Women Involved in Farm Economics v. USDA*, 876 F.2d 994, 1004 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). The rational-basis test permits "general rules . . . , even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." *Id.* at 1007 (internal quotation omitted); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-4 (2d ed. 1988) (test may permit "overinclusiveness" and "underinclusiveness").

Thus, the rational-basis claim is "purely legal" for purposes of *Abbott Laboratories*, and we reach the merits.[18] *Cf. Preferred Communications*, 476

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[18] Where an issue is "fit for judicial decision," we need not evaluate the "hardship to the parties," but rather proceed directly to the merits. *See, e.g., American Petroleum Inst. v. EPA*, 906 F.2d 729, 739 n.13 (D.C. Cir. 1990).

We acknowledge that the as-applied, rational-basis challenge might depend on the *kind* of local franchising regime. Conceivably, the exemption of MDS, single-building SMATV

U.S. at 495-96 (implying that Court would not have needed fuller factual development for rational-basis challenge to cable franchising); *Pennell v. City of San Jose*, 485 U.S. 1 (1988) (in facial challenge to local rent control ordinance, finding "takings" claim unripe, but equal protection claim ripe).

On the record before us, we fail to see a "rational basis" for franchising *external, quasi-private* SMATV but not *internal* and *wholly private* systems. The fact that cable television uses public rights-of-way has been the predominant rationale for local franchising. As the FCC stated in promulgating the Cable Definition Rule: "The dual federal-local jurisdictional approach to regulating cable television service is largely premised on the fact that cable systems necessarily involve extensive physical facilities and substantial construction upon and use of public rights of way in the communities they serve." *In re Definition of a Cable Television Sys.*, 5 F.C.C. Rcd. 7638, 7639 (1990). The FCC articulated this rationale throughout the pre-Cable Act period. *See, e.g., Cable Television Report & Order*, 36 F.C.C.2d 143, 207 (1972) ("persuasive argument[] against federal licensing" is that "cable makes use of [local] streets and ways"); *In re Amendment of Part 76*, 54 F.C.C.2d 855, 861 (1975) ("ultimate dividing line [between local and federal cable regulation] . . . rests

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and other such facilities from one kind of franchising regime would pass rational-basis scrutiny, while their exemption from another kind would not. However, this possibility seems too speculative to justify deferring review, since we are hard pressed to imagine why *any* kind of discriminatory franchising system is justified. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 135 (Yale Univ. Press 1986) (1962) (ripeness "depend[s] on at least an initial judgment of the merits").

on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications"); *Orth-O-Vision*, 82 F.C.C.2d at 183 (citing 1972 report); *Earth Satellite Communications*, 95 F.C.C.2d at 1235 (same). And Congress did the same in promulgating the Cable Act. *See Senate Report* at 7 (Senate bill "seeks to restore the jurisdictional boundaries over cable to their more traditional positions," with the "'ultimate dividing line . . . [resting on cable's] use of the streets and rights-of-way'") (quoting 1975 report); 129 CONG. REC. 15,590 (1983) ("[n]o one can doubt that localities should be able to exert some control over cable because it crosses public rights of way") (Senator Hollings).

However, this right-of-way rationale does not explain the distinction between *external, quasi-private* SMATV and *internal* or *wholly private* facilities, because none of the three use public rights-of-way. Nor do the congressional reports and debates on the Cable Act articulate an explanation. We assume without deciding that minimum equal protection scrutiny requires only a "conceivable basis," not an "articulated basis." *See Women Involved in Farm Economics*, 876 F.2d at 1005 n.7. Nonetheless, we are unable to imagine *any* basis for the distinction.

Rather than vacating the Cable Definition Rule, we direct the FCC to address the rational-basis issue. "[I]t may sometimes be appropriate to resort to extra-record information to enable judicial review [of agency action] to become effective." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). Where this court "needs more evidence to enable it to understand the issues clearly," *id.*, we have discretion to

supplement an administrative record. In the instant case, we require additional "legislative facts" concerning the distinction between *external, quasi-private* SMATV and the video transmission facilities exempted by the Cable Definition Rule. *See* 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 175-77 (2d ed. 1980) (courts should in some instances remand to agencies for legislative factfinding on constitutional issues); *cf. National Wildlife Fed'n v. ICC*, 850 F.2d 694, 702-08 (D.C. Cir. 1988) (remanding for reconsideration of "takings" issues that agency had inadequately addressed). Thus, we direct the FCC to consider within 60 days whether there is some "conceivable basis" for requiring local franchising of *external, quasi-private* SMATV facilities but not *private* or *wholly internal* facilities.

III. CONCLUSION

The Cable Act plainly defines an *external, quasi-private* SMATV facility as a "cable system." Petitioners' First Amendment challenge to the local franchising of *external, quasi-private* SMATV is unripe, but we reach the merits of their equal protection challenge. The FCC is directed to consider within 60 days whether there is some "rational basis" for a distinction between *external, quasi-private* SMATV and those facilities that the FCC has ruled exempt from local franchising. Accordingly, the record is hereby remanded.

MIKVA, *Chief Judge*, concurring in part and concurring in the judgment: "In cases where a classification burdens neither a suspect group nor a fundamental interest," the Supreme Court recently reminded us, "'courts are quite reluctant to overturn

governmental action on the ground that it denies equal protection of the laws.'" *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2406 (1991) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). Although I concur in most of my colleagues' opinion, I do not join section II(B)(2), the section addressing petitioners' equal protection challenge, because I think it shows too little reluctance to overturn complex economic legislation under the minimal rational-basis test.

To my colleagues, the FCC's distinction between different types of SMATV systems—a distinction, I agree, that is required by the plain meaning of the Cable Act—"poses a serious constitutional problem." Maj. op. at 3. It "may violate the minimal equal-protection test," maj. op. at 21; indeed, the equal-protection claim is "apparently valid." Maj. op. at 22. Although acknowledging that petitioners' challenge must fail if the law rests on a "rational basis," my colleagues see nothing "[o]n the record before us" to sustain the challenged distinction, maj. op. at 23, and are "unable to imagine *any* basis for the distinction," maj. op. at 24, a point they repeat for emphasis, *see* maj. op. at 22 n.18. My colleagues remand so that the FCC can provide a justification for the distinction, but their strong language might suggest that no justification will satisfy them.

Such a conclusion would, in my view, mark a new and unfortunate turn in rational-basis review. The Constitution is a blueprint for a workable government, and "[w]e must remember," as Justice Holmes wrote, "that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931). When Congress and state legislatures confront complex problems, interest groups and experts push many

different, frequently incompatible, solutions. The democratic process—politics, if you will—often denies legislatures the option of picking the theoretically *correct* outcome, leaving them to strive for the *best possible* outcome under the circumstances. Because the only alternative would be to discourage legislators from making even an attempt to address complicated social and economic problems, the Constitution wisely permits legislative bodies to piece together practical plans—"rough accommodations," as the Supreme Court put it long ago, "illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913). Undoubtedly, the political process sometimes gets it wrong, but the Constitution presumes that, as long as the groups involved have a fair chance to fight in the political arena, the democratic process will right itself. Legislatures may change flawed laws, or voters may even "throw the bums out." The Constitution reserves judicial review for situations where one may suspect the democratic process. It forbids the judiciary from "sit[ting] as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

None of that is new, of course, and I doubt that my colleagues disagree with the background. But I think we should keep that background in mind as we engage in constitutional scrutiny under the rational-basis test. Under that test, legislatures may single out classes of people as long as the lines drawn are not "'invidious or irrational.'" *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 176 (1980) (citation omitted). "A classification having some reasonable basis does not offend [equal protection principles] merely because it is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (quoted in more than two-dozen Supreme Court cases including, most recently, *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989)). Accordingly, the Supreme Court has struck down only a handful of statutes under the rational-basis test; even the *Lochner* Court rarely invoked equal protection principles to invalidate economic legislation. And almost every law declared unconstitutional under rational-basis review involved a class of people who, for one reason or another, faced obstacles to their participation in the political process that produced the challenged law—such as the mentally retarded, *see City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); children of illegal aliens, *see Plyler v. Doe*, 457 U.S. 202 (1982); or out-of-state companies challenging a state law that "discriminat[ed] against nonresident competitors," *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 875 n.5 (1985); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-3 p. 1445 (2d ed. 1988) ("Th[e] sporadic move away from near-absolute deference to legislative judgments seems to be a judicial response to statutes creating distinctions among classes of residents based on factors the Court evidently regards as in some sense 'suspect' but appears unwilling to label as such.").

Not only should economic legislation be upheld as long as the classifications drawn in the statute "are reasonable in light of its purpose," *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964), but the justification for the legislation need not appear in the legisla-

tive or administrative record. As the Supreme Court has said:

> Where . . . there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.

United States R.R. Retirement Bd., 449 U.S. at 179 (quoting *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)). My colleagues "assume without deciding" that minimal equal protection scrutiny requires only a "conceivable basis," not an "articulated basis," maj. op. at 24, but I think that question is settled. The Supreme Court stated last Term that, under the rational-basis test, a "statutory distinction does not violate the Equal Protection Clause 'if any state of facts reasonably *may be conceived* to justify it.'" *Sullivan v. Stroop*, 110 S. Ct. 2499, 2504 (1990) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 601 (1987) (emphasis added)). My colleagues are right to search the record for possible justifications, *see* maj. op. at 22, but to the extent their opinion implies that justifications in the record are necessary or have special significance in rational-basis review, I must disagree.

Against a rational-basis challenge, I think the Cable Act comes to us bearing a very strong presumption of constitutionality, a presumption that can be sustained by justifications in or out of the record. The Cable Act is a large and complex piece of socioeconomic legislation, an effort to establish a comprehensive regulatory scheme for the cable industry, a product of public hearings, private negotiations, and compromise. SMATV operators, the petitioners in this suit, participated actively in the process and, in fact, did quite well. With only one exception—the one at issue here: SMATV systems that interconnect multiple, separately owned buildings with physical wiring on private property—SMATV facilities are excluded from Cable Act requirements. My colleagues appear to think that the challenged provision of the Cable Act is unlikely to survive minimal equal-protection review (though I'm not sure how they can suggest that the challenged provision is absurd for purposes of constitutional analysis after holding that the FCC's reading of the provision is not absurd for purposes of statutory analysis, *see* maj. op. at 11). I do not share my colleagues' doubts. Perhaps rough, the distinctions in the statute strike me nevertheless as entirely reasonable in light of the Cable Act's purposes.

As I read section II(B)(2), my colleagues are troubled by two distinctions in the law. The first is between what my colleagues call "external, quasi-private" SMATV (subject, under the challenged provision, to Cable Act requirements) and "internal" SMATV (not subject, under the challenged provision, to Cable Act requirements). That distinction seems to me a reasonable way to promote the development of non-physical video delivery systems. Under the statute, a SMATV facility serving multiple, separately owned buildings is covered by the Cable Act if the broadcast signal is transmitted to the buildings through cable or other physical wiring, and exempt from the Cable Act if the broadcast signal is transmitted through the air via radio waves. (The latter system is the one my colleagues' term "internal" and,

although I am happy to borrow the useful shorthand, I think it is worth noting that an "internal" system does serve multiple buildings.) The effect of the rule, as both petitioners and the FCC say, is to create an incentive for SMATV operators to switch from physical wiring to radio transmission so that they are exempt from regulation under the Act. But that, I think, is entirely consistent with Congressional and FCC policy of promoting "new technologies that offer substantial public benefits." *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1197 (D.C. Cir. 1984). In fact, the FCC chose to preempt local regulation of some SMATV systems in part to advance "the federal interest in 'the unfettered development of interstate transmission of satellite signals.'" *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 808 (D.C. Cir. 1984). That same federal interest, it seems to me, justifies the statutory distinction here. I am not at all persuaded that a classification that encourages SMATV operators to use radio-wave technology instead of cable wiring violates equal protection principles.

My colleagues also seem to be concerned about the distinction between "external, quasi-private" SMATV (subject, again, to Cable Act requirements) and "wholly private" SMATV (not subject to Cable Act requirements). I think that distinction is reasonable in light of the Cable Act's purpose of promoting consumer, or viewer, interests. Under the statute, a SMATV system on private property is covered by the Cable Act if it serves multiple buildings that are *not* commonly owned, managed or controlled, and not covered by the Act if it serves buildings that *are* commonly owned, managed or controlled. In adopting the Cable Act, Congress could have taken the reasonable

position that a SMATV system serving multiple buildings not under common ownership is similar to a traditional cable system and likely to give rise to similar problems from the perspective of the viewer. Congress could have reasoned, meanwhile, that a SMATV facility serving buildings under common ownership is likely to be smaller, and the ability of residents to influence ownership likely to be greater, so that the costs of regulation could outweigh the benefits. Similarly, in adopting the SMATV provision, Congress could have concluded that regulation of facilities serving multiply owned buildings is a reasonable way to enhance the diversity of broadcast information, while SMATV systems serving buildings commonly owned are, again, likely to be smaller and not in need of regulation. The challenged classifications, in sum, pose line-drawing problems. "[A]nd the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *United States R.R. Retirement Bd.*, 449 U.S. at 179.

Because my colleagues mention only the public rights-of-way rationale for the Cable Act, I should note that the consumer-interest and diversity-of-information rationales plainly appear on the face of the Act (along with four other stated objectives): the law is intended to "establish franchise procedures and standards which encourage the growth and development of cable systems and which *assure that cable systems are responsive to the needs and interests of the local community*"), 47 U.S.C. § 521(2) (emphasis added); and it is intended to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521(4). (The

Act is also intended to serve the broad purpose of "establish[ing] a national policy concerning cable communications." 47 U.S.C. § 521(1).) The Cable Act provides for the regulation by franchising authorities, under certain circumstances, of cable systems' rates, services, facilities and equipment. 47 U.S.C. §§ 543-544. And it contains provisions designed to encourage diversity of information distribution, such as those authorizing franchising authorities to require that cable operators set aside a portion of their channels for public, educational and governmental access channels, 47 U.S.C. § 531, and for other programmers, 47 U.S.C. § 532.

In light of the requirements the Cable Act imposes, the Cable Definition Rule might raise First Amendment questions and it might pose problems under "fundamental rights" equal-protection scrutiny—questions, I agree with my colleagues, we need not now decide. But I think the statute does not pose serious constitutional problems under rational-basis review. The classifications in the cable definition provision, as I've suggested, are reasonable in light of the Cable Act's purposes. In fact, given the variety and scope of the statute's purposes, I am confident the FCC will suggest justifications I have not mentioned.

I do not, finally, disagree with my colleagues' decision to remand the case to the FCC so that it can provide justifications for the classifications in the statute. This is a complicated area, and the expert agency is certainly better equipped than the court to put the classifications in context. Unfortunately, when the FCC defended the Cable Definition Rule before us, it provided no explanations for the distinctions in the law. It chose not to reply to petitioners'

constitutional arguments, resting on its response that the challenges were not ripe. The Commission should have done more, and my colleagues are right to demand more. I only hope that my colleagues' dicta about the merits of petitioners' rational-basis claim reflect frustration with the FCC rather than a new approach to rational-basis review.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-1089

BEACH COMMUNICATION, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

[Filed May 5, 1992]

REPORT OF RESPONDENT FEDERAL COMMUNICATIONS COMMISSION IN RESPONSE TO OPINION OF MARCH 6, 1992

The Federal Communications Commission respectfully submits this report in response to the Court's opinion of March 6, 1992, in the captioned case. The Court in that opinion affirmed the FCC's interpretation of the definition of a "cable system" set forth in the 1984 Cable Act. Slip opinion at 11-15. But the Court remanded the record to the FCC with directions that it "consider within 60 days whether there is some 'rational basis' for a distinction between *external, quasi-private* SMATV and those facilities that the FCC has ruled exempt from local franchising." Slip opinion at 21-25 (emphasis in original). The remand came in the context of the Court's consideration of an argument on review that the definitional rule set forth in the Cable Act violates equal protection rights by subjecting to local franchise regulation some facilities that are not rationally distinguishable from other facilities that are exempt from franchise regulation. For the reasons set forth below, the Commission hereby reports to the Court that it is unable to provide additional "legislative facts," beyond those provided by Judge Mikva in his concurring opinion, in justification of the distinctions set forth in the Cable Act.[1]

The equal protection issue in this case involves three types of video delivery systems, none of which uses the public right-of-way. The first, in terminology adopted by the Court for purposes of this opinion, is an "external, quasi-private" facility that uses wire (or other "closed transmission path") "externally" to connect separately-owned, managed, or operated multiple-unit buildings. The second is an "internal" facility that uses wire or cable only "internally" in the buildings it serves and uses technology other than wire (or other closed transmission path) to interconnect separate buildings. The third is a "wholly private" facility that serves a single building or a group of commonly-owned, managed, or operated multiple-unit buildings interconnected by wire or some other open or closed transmission path. Slip opinion at 10. Under the Cable Act definition of a cable system, as interpreted by the FCC, an "external, quasi-private facility" is subject to local franchise regulation, whereas "internal" and "wholly

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[1] The Commission instructed its General Counsel to make this report to the Court in an appropriate pleading.

private" facilities are not. Slip opinion at 23.[2] Because a majority of the panel was "unable to imagine *any* basis for the distinction" between the systems subject to franchising and those not subject to franchising, slip opinion at 24, the Court remanded the record to permit the Commission to consider whether there is some "conceivable basis" for the distinction, slip opinion at 25.

The majority opinion also identified other equal protection issues that might have to be addressed, depending upon the showing the Commission might make after remand. Thus, the majority stated that it would "need to consider whether a heightened-scrutiny equal protection challenge is ripe" if it were persuaded by a Commission showing that the cable definition satisfied the minimal "rational basis" test. Slip opinion at 21-22. If the challenge were ripe, the Court presumably would move on to that issue and require further, more elaborate showings of justification under the heightened scrutiny test. The majority also stated that if the FCC were to provide a "rational basis" for the distinction between "external" and "wholly private" facilities, but not for the distinction between "external" and "internal" facilities, the Court itself might have to consider whether a reasonable construction of the definitional section of the Cable Act would permit a resolution of the equal protection claim. Slip opinion at 21 n.17. The majority implied that such a reasonable construction might take the form of including "internal" systems within

[2] The Court affirmed the Commission's interpretation of the definitional provisions, finding that "there is no reasonable alternative construction" that would exempt external, quasi-private SMATV facilities from local franchise regulation. Slip opinion at 11-15.

the definition of a cable system and thus subjecting them to local franchising requirements, *id.*—a solution that would impose regulation on a class of systems that the Commission never has considered to be cable systems.

In a concurring statement, Judge Mikva disagreed with the majority's suggestion that "no justification" can save the definitional provisions of the Cable Act. Addressing himself to the three categories of facilities, Judge Mikva offered four pages of analysis that in his view made the classifications "reasonable in light of the Cable Act's purposes." Slip opinion, concurring statement of Judge Mikva ("concurring statement") at 4-7. Although Judge Mikva concurred in the decision to remand the record and although he recognized that the definitional scheme "might raise First Amendment questions and . . . might pose questions under 'fundamental rights' equal protection scrutiny," he asserted that "the statute does not pose serious constitutional problems under rational-basis review." Concurring statement at 7. Judge Mikva would have held that legislatures may single out classes of people (and, presumably, classes of video delivery systems) "as long as the lines drawn are not 'invidious or irrational.'" Concurring statement at 2 (*quoting United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 176 (1980)).

Although the majority presumably had the concurring statement before it, *see* "Handbook of Practice and Internal Procedures," D.C. Circuit (August 1, 1987), at 63, the majority opinion did not address the analysis that statement provided. The majority's strong language, in fact, suggests that it would not accept that analysis as a jusification for the different treatment of the classes of facilities. *See* slip opinion at 23 (majority "fail[s] to see" a rational basis), 24

most of it has been assigned to specific licensees." *Notice of Proposed Rule Making and Tentative Decision in GEN Docket No. 90-314*, 7 F.C.C. Rcd. 5676, 5689 (1992). Greater use of the airwaves, to the extent they remain available, increases the potential for signal interference between users. It is inconceivable that Congress would advocate the use of scarce radio waves to interconnect buildings, when alternative physical media are available for that purpose.[12] Indeed, the FCC is actively "encouraging migration to other, non-radio alternative media" by licensees who are technically capable of doing so, to make room on the spectrum for developing technologies that have no alternative to the use of radio frequencies. *Notice of Proposed Rule Making in ET Docket No. 92-9*, 7 F.C.C. Rcd. 1542, 1548, n.17 (1992) (proposing financial incentives for certain current users of radio waves to switch to fiber, thereby creating spectrum space for emerging communications technologies that require use of radio).

Chief Judge Mikva's suggestion that the anomalies of the discriminatory classification reflect congressional intent to "promote the development of *non-physical* video delivery systems," App. at 41a (emphasis added), conflicts with the actual federal policy encouraging use of "*non-radio* alternative media." *ET Docket No. 92-9*, 7 F.C.C. Rcd. at 1548, n.17 (emphasis added). Since federal policy favors the use of physical media, the discriminatory classification cannot be saved by attributing to Congress a contrary and unwise policy.[13]

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[12] After all, to interconnect adjacent separately-owned buildings by a short span of cable wiring is technically simpler, more efficient, very inexpensive and involves no potential interference to other communications users.

[13] Following remand to the FCC, the D.C. Circuit adjudicated the unconstitutionality of Section 602(6) *solely* on the basis of the arbitrary distinction between commonly and separately-owned buildings. App. at 3a. If this Court were inclined to review

[footnote continued]

C. The Federal Communications Commission Failed To Offer A Conceivable Basis For The Discriminatory Classification.

The court of appeals bent over backwards, but still could not conceive of a rational basis to sustain the constitutionality of Section 602(6). When the FCC failed to proffer a conceivable basis either in its briefs or at oral argument, the court of appeals afforded the agency an extra opportunity upon remand to defend Congress' discriminatory classification. App. at 36a. Upon remand, the FCC was clearly unable to proffer a conceivable governmental interest in regulating, to any extent, the ability of video providers to engage in protected speech which occurs wholly on private property, much less a conceivable governmental interest in exempting the protected speech of most, but not all, video distribution systems occurring wholly on private property from such entry regulation. While Petitioners seek to characterize the FCC's response as a substantive one which fully buttresses the two justifications offered by Chief Judge Mikva, and which reflects congressional intent, the FCC's Report was in reality a faint endorsement of Chief Judge Mikva's reasoning and a barely disguised *rejection* of Congress' classifications:

> [T]he Commission hereby reports to the Court that it is unable to provide additional "legislative facts," beyond those provided by Judge Mikva in his concurring opinion, in justification of the distinctions set forth in the Cable Act. [footnote omitted]
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> * * *

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that determination, the Petition should still be denied since, even if a rational basis for that distinction were found, it would not justify the distinction based upon whether separately-owned buildings are interconnected by wire versus wireless technology. This latter distinction is supported only by the theory that Congress intended to use up valuable spectrum space. That is an untenable theory, as shown above, and as strongly suggested by the D.C. Circuit. App. at 34a.

From its review, after remand, of the relevant legislative history and of its own policy preferences, the Commission is unaware of any desirable policy or other considerations – beyond those suggested by Judge Mikva in his concurring opinion – that would support the challenged distinctions.

* * *

As the Court may recall [footnote omitted], the Commission in an earlier interpretation of the cable definition had taken the position that, when multiple unit dwellings are involved, a facility's use of the public right-of-way should be the sole basis for determining the facility's status as a cable system and therefore its susceptibility to local franchise regulation [citing *In Re Amendment of Parts 1, 63 and 76 of the Commission's Rules,* 58 Rad. Reg. 2d (P&F) 1, *modified,* 104 F.C.C.2d 386 (1986), *aff'd in part and rev'd in part, American Civil Liberties Union v. FCC,* 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied,* 485 U.S. 959 (1988)]. Under that interpretation, which reflected the Commission's own policy preference, none of the facilities under consideration here would have been subject to franchise regulation under the Cable Act.

* * *

The Commission's current interpretation of the cable definition, which results in the regulatory distinctions that are challenged on equal protection grounds, was dictated by the unambiguous language of the statute, and not by any policy determination by the FCC in support of that interpretation.

App. at 47a, 50a-51a.

The FCC was more interested in ensuring that the court of appeals knew that Congress was in the process of amending the Cable Act, had been informed of the court of appeals' March 6, 1992 decision, and thus would have the "opportunity to revise the definitional provisions of the 1984 Act" if it chose to do so. App. at 51a-52a. It

is telling that Congress, in fact, chose *not* to do so[14] in the face of the recommendation by the majority of the court of appeals that Congress "act to remedy the situation" if Congress found the court to have "misunderstood congressional intent in [its] construction of the Act and its underlying purposes". App. at 6a-7a. "Congress is presumed to be aware of a[ ] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . ." *Lorillard v. Pons,* 434 U.S. 575, 580 (1978) (citation omitted). Thus, Congress and the FCC apparently stand united at this juncture in their joint policy decision that only those video distribution systems using public rights-of-way to deliver their services to the public should be subjected to local franchising jurisdiction. This Court need not grant review upon Petitioners' urging to reinstate a franchising requirement that Congress itself chose not to reinstate. *Lorillard,* 434 U.S. at 580.

II.
THIS COURT NEED NOT GRANT REVIEW BECAUSE THE COURT OF APPEALS APPLIED THE PROPER STANDARD FOR RATIONALITY REVIEW.

Petitioners' discussion of this Court's precedents concerning the rationality review standard underscores, rather than undermines, the correctness of the court of appeals' ruling here and the court's complete adherence to that standard. For example, Petitioners, Pet. at 17, cite *Vance v. Bradley,* 440 U.S. 93 (1979), for the proposition that "those challenging the legislative judgment must convince the court that the *legislative facts on which the classification is apparently based* could not reasonably be conceived to be true by the governmental decision-maker." *Id.* at 110-111 (emphasis added).

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[14] Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, a major revision of the Cable Act, on October 5, 1992, without altering § 602(6).

Yet the court of appeals' decision to remand to the FCC was precisely for the purpose of ascertaining such "legislative facts". *See* App. at 36a ("In the instant case, we require additional 'legislative facts' concerning the distinction between external, quasi-private SMATV and the video transmission facilities exempted by the Cable Definition Rule."). Chief Judge Mikva concurred in the majority's efforts to have "the expert agency [, which] is certainly better equipped than the court [,] put the classifications in context" and recognized that the FCC had "[u]nfortunately . . . provided no explanations for the distinctions in the law". *See* App. at 44a. Since the sole historical rationale for subjecting interstate communications media to local regulation was the public rights-of-way rationale, and since the legislative history of the Cable Act was apparently bereft of any additional rationale for the discriminatory classification, the court of appeals rightly sought assistance from the FCC in identifying the "legislative facts on which the classification is apparently based". Far from providing such legislative facts, the FCC refused to proffer any rationale for the distinction beyond affording lip service to those suggested by Chief Judge Mikva, and instead completely *divorced* itself from Congress' action, asserting that the FCC agreed entirely with the public rights-of-way rationale but was hampered by "the unambiguous language of the statute." *See supra* at 20.

In *Vance*, this Court found the legislative history of the statute at issue replete with references to a proper governmental interest sought to be furthered by the classification as well as the reasons why Congress concluded that such classification would further the governmental objective. Here, the court of appeals found the legislative history of the Cable Act and the pre-Cable Act FCC regulatory policy replete with references to the public rights-of-way rationale as the basis for Congress' interest in permitting local franchising over an interstate

communications media and no reasoning as to how the discriminatory classification rationally furthered that interest. In searching for a different governmental interest sought to be advanced by the classification, the court of appeals was left high and dry by the FCC.[15]

Petitioners further assert that the purpose of the remand was to gather "empirical proof" or an "articulated basis" contrary to this Court's decisions in *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955); and *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949). Petitioners are in error. The court of appeals never once indicated in either of its decisions that the FCC was charged with a responsibility greater than simply explaining what "state of facts reasonably may be conceived to justify" the discriminatory classification. *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990), *quoting Bowen v. Gilliard*, 483 U.S. 587, 601 (1987). Given the FCC's expert knowledge of the various video transmission industries, how each operates and their relationship to one another, the court of appeals rightly assumed that if such a "state of facts" could be "conceived", the FCC was in the best position to do so. Even Chief Judge Mikva, the dissenting judge, concurred in this approach. App. at 44a.

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[15]The "discriminatory classification" upheld in *Vance* is not particularly instructive here. Congress distinguished between Foreign Service and Civil Service personnel in establishing a mandatory retirement age, not as between Foreign Service personnel. In the instant case, Congress has not only classified SMATV operators differently from MDS operators for purposes of the franchising requirement, but has also classified certain SMATV operators differently than other SMATV operators, apparently solely on the basis of the ownership of the real estate which such operators may serve. *See generally Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (overturning a classification distinguishing not only between resident veterans and non-veteran residents, but also between resident veterans, solely on the basis of when such veterans moved into the state); *Zobel v. Williams*, 457 U.S. 55 (1982).

The FCC declined to speculate as to Congress' reason for distinguishing amongst those video transmission facilities who made no use of the public rights-of-way for purposes of local entry regulation. The FCC refused to describe for the court of appeals either what dissimilarities or similarities *could* be conceived to exist as between (1) the exempt and nonexempt video distribution facilities and (2) traditional cable systems, so as to justify local regulation of some but not all on a basis other than the historical public rights-of-way rationale. Thus, the court of appeals was correct in concluding that the possible basis posited by Chief Judge Mikva, *i.e.*, "the impression of 'similarity' " between traditional cable systems and external, quasi-private SMATV facilities (necessarily assuming incorrectly a dissimilarity between traditional cable systems and either wholly private SMATV facilities or internal facilities *see supra*, at 13-16), "is just that: a naked intuition, unsupported by conceivable facts or policies [citation omitted]." App. at 4a. *City of Cleburne*, 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").[16]

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[16]The purported rationale is also inconsistent with Commission policy regarding the emerging "video dialtone" technology. During the pendency of the proceedings below, the FCC concluded that an external, quasi-private system operator interconnecting separately owned or managed buildings from a single headend by leasing the cable from the telephone company does not need to obtain a franchise; that operator must obtain a franchise only if it interconnects separately owned or managed buildings with its own cable. *Telephone Company-Cable Television Cross Ownership Rules*, 7 F.C.C. Rcd. 300, 324-25 (1991) (holding that local telephone companies may act as common carriers for the delivery of video programming, but that neither the telephone company *nor* the party providing the programming need obtain a local franchise under the Cable Act). This decision further underscores the irrationality of the franchising requirement as imposed only upon external, quasi-private systems using their *own* cable.

It was well within the FCC's expertise to be aware of whatever dissimilarities or similarities might or would support Congress' classifications. The court of appeals did not ask the FCC to provide evidentiary proof of such similarities or dissimilarities, or to identify where in the Cable Act or its legislative history Congress "articulated" same; the court of appeals simply directed the FCC to supply a "reasoned justification in terms of *some* public purpose". App. at 4a (emphasis in original). Clearly, the court of appeals did not depart from this Court's precedents in determining that this case represented one of the rare instances in which Congress had engaged in a "wholly arbitrary act" in its classification scheme. *City of New Orleans v. Dukes*, 427 U.S. 297, 304 (1976).

In *Railway Express*, 336 U.S. at 110, this Court could conceive of a sufficient dissimilarity between the "nature or extent" of vehicle advertising used by self-advertisers versus general advertisers such that a municipal ordinance permitting the former but banning the latter appeared rationally to further the local interest in reducing distractions causing traffic problems. Here the FCC expressly stated it could *not* conceive of sufficient similarities or dissimilarities beyond those advanced by Chief Judge Mikva. As set forth *supra* at 15-16, the single "similarity" proffered by Chief Judge Mikva between nonexempt video distribution systems and traditional cable systems, *i.e.*, "larger system size", is also shared to an even greater degree between exempt wireless video distribution systems and traditional cable systems. Thus, being a shared characteristic rather than a distinguishing characteristic, "system size" cannot afford the rational basis for the varying classifications. Moreover, while the regulation in *Railway Express* would obviously reduce at least some of the distractions, here nonexempt facilities can become exempt facilities and remain the exact same size in doing so, thus easily defeating the alleged governmental interest sought to be served.

This case is also unlike *Lee Optical*, in which Petitioners contend this Court "imputed rationality to the process of legislative line drawing when the evidence of record did not definitively foreclose the existence of plausible facts supporting it". Pet. at 16-17. Here the "evidence of record" does "foreclose the existence of plausible facts" justifying the discriminatory classification. Again, the evidence of record proves only similarities, not dissimilarities between the exempt and nonexempt facilities. The evidence of record further proves that the only dissimilarity between traditional cable systems and the exempt and nonexempt facilities taken together is the use of the public rights-of-way. The record is extensive with respect to the public rights-of-way rationale, but is silent with respect to any other rationale for local jurisdiction over interstate communications media. The "plausible facts" posited by Chief Judge Mikva and now by Petitioners are foreclosed by this "evidence of record" since such facts would also have justified Congress' imposition of a franchising requirement upon wireless MDS operators who are in every instance of larger size on a community by community basis than their SMATV counterparts serving either single buildings, commonly-owned buildings, or separately-owned buildings.

Finally, Petitioners contend that this Court's rationality review in *Fritz* compels a reversal of the court of appeals decision here because Congress need not either "explicitly state or empirically verify" its reasons for a particular classification, but rather only a "plausible ground" need be conceived for it. Yet the court of appeals did not require verification or congressional explication. This is not legislation which is merely "unwise" or "unartfully drawn". *Fritz*, 449 U.S. at 175. This is legislation in which the alleged purpose for imposing local franchising on some but not all video distribution systems who do not use the public rights-

of-way is implausible and defies common sense. The court of appeals, consistently with this Court, simply refused to permit the rational-basis test to be deprived of any meaning, to become merely a "toothless" standard.

III.

THIS COURT NEED NOT GRANT REVIEW BECAUSE THE DISCRIMINATORY CLASSIFICATION DOES NOT SURVIVE APPLICATION OF A HEIGHTENED SCRUTINY STANDARD.

This Court should not grant the Petition because even overturning the D.C. Circuit's rational basis analysis would not save Section 602(6) from unconstitutionality. The failure of the statutory provision to pass the rational basis test rendered it unnecessary for the court of appeals to decide whether to apply a heightened level of scrutiny, as urged by Respondents in light of the First Amendment rights which are infringed by the Cable Act's prohibition against the provision of cable services without a franchise. App. at 32a. However, heightened scrutiny *is* appropriate in these circumstances, and the application of that test compels the invalidation of the discriminatory classification even if the rational basis standard is satisfied.

"Cable television . . . is engaged in 'speech' under the First Amendment . . . ." *Leathers v. Medlock*, 111 S.Ct. 1438, 1442 (1991). A government regulation prohibiting the operation of the facilities necessary to transmit cable programming "plainly implicates First Amendment interests." *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986). Moreover, the Constitution prohibits disparate treatment of similarly situated speakers. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978).

Section 602(6) favors some speakers over others by requiring a franchise of speakers who are materially indistinguishable from other speakers whom Congress exempted from the franchising requirement. Therefore,

the statutory provision is subject to heightened scrutiny, rather than the otherwise applicable rational basis test. *Police Department of Chicago v. Mosley,* 408 U.S. 92, 101 (1972). "The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Id.* "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown,* 447 U.S. 455, 461-62 (1980).[17]

As shown above, the distinction drawn by Congress is wholly irrational. Although the FCC repeated, without more, the justifications for that distinction as offered by Chief Judge Mikva, they do not satisfy the rational basis test, and therefore obviously cannot survive heightened scrutiny. The constitutional infirmity of the discriminatory classification under heightened scrutiny is particularly apparent in view of the requirement that the regulation be narrowly tailored to serve the purported governmental interest. If Congress were attempting to impose local regulation based on the size of the system and the number of subscribers served, it could have specified a certain numbers of subscribers that would trigger local

[17] *Carey* and the other cases cited impose heightened scrutiny when the government places burdens on speech occurring in a public forum, while the SMATV operators whose speech is burdened by the discriminatory classification here are seeking to speak on private property, *e.g.*, private apartment buildings. The scrutiny should be at least as strict in this case as in those involving public speaking, since governmental interference with speech which occurs on private property at the invitation of the owners and occupants of the property presents a more serious invasion of First Amendment rights than regulation of public forums. *See Stanley v. Georgia,* 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that [the government] has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.")

franchising requirements. Such a regulation would be so narrowly tailored as to constitute a perfect fit with the asserted governmental interest.

By contrast, Section 602(6) imposes local franchising requirements on a system which serves 75 subscribers in a group of separately-owned buildings, while exempting a system serving 1,000 subscribers in a single building. Moreover, a video provider can avoid franchising under the statutory provision, by installing separate headend facilities at each property served or by operating a wireless system, and thereby serving a potentially infinite number of subscribers. Obviously, Section 602(6) is not narrowly tailored to further the government's purported interest in imposing local regulation based on the size of the cable market served. Thus, the section is unconstitutional under the heightened scrutiny test.

The D.C. Circuit may have been hesitant to apply heightened scrutiny, despite the First Amendment interests at stake, in view of its finding that Respondents' substantive First Amendment challenge to the discriminatory classification was unripe. App. at 27a. However, that unripeness[18] does not affect the level of scrutiny to be applied when examining an equal protection claim that itself *is* ripe. The language of the equal protection cases applying heightened scrutiny makes clear that standard is applicable, even if the exact degree of the infringement on constitutional rights is not fully apparent. *See Mosley,* 408 U.S. at 101 (statutes "affecting" First Amendment interests subjected to heightened scrutiny); *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 254 (1974) (heightened scrutiny applied to regulation which "impinged" on fundamental right); *Dunn v. Blumstein,* 405 U.S. 330, 339-42 (1972) (applying heightened

[18] Respondents respectfully disagree with the D.C. Circuit's ripeness analysis, but have not filed a cross-petition.

scrutiny to regulation which affected, but did not deter, exercise of constitutional right).

Following precedent of this Court, the D.C. Circuit properly found that the plain language of Section 602(6) "affects" and "impinges on" a fundamental right: "At the outset, we acknowledge that a First Amendment problem is posed." App. at 25a, citing *Leathers*, 111 S.Ct. at 1442. This indisputable finding requires application of heightened scrutiny, if the discriminatory classification passes the rational basis test. *Mosley*, 408 U.S. at 101. Since such classification fails under heightened scrutiny, this Court should refrain from exercising discretionary jurisdiction in a case where the outcome will remain unchanged.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied. The decision below is wholly consistent with this Court's precedent applying the rationality review standard and correctly determined that the discriminatory classification established in §602(6) of the Cable Act, 47 U.S.C. §522(6), violates the equal protection component of the Fifth Amendment.

Respectfully submitted,

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November 9, 1992

No. 92-603

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

BEACH COMMUNICATIONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

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1. In defending the D.C. Circuit's decision finding irrational the definition of "cable system" in the Cable Communications Policy Act of 1984 (Cable Act), 47 U.S.C. 522(6), respondents[1] emphasize that the Federal Communications Commission traditionally relied on use of public rights-of-way as a basis for subjecting cable operators to local franchising requirements. Br. in Opp. 5-12. They suggest that because facilities that serve separately owned build-

[1] We use the term "respondents" to refer to respondents in opposition. We refer to respondent National Cable Television Association, Inc., which filed a brief in support of the petition, as "NCTA."

ings without crossing public rights-of-way would not fall within the FCC's traditional justification for requiring the franchising of cable facilities, the rationality of the Cable Act's regulatory structure is open to question. Br. in Opp. 7-10. For two reasons, however, respondents' argument is beside the point.

First, while it is true that a facility's use of public rights-of-way has been a crucial determinant in allocating responsibility over cable to local governments, see, *e.g.*, *New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804, 810-811 (D.C. Cir. 1984), that hardly forecloses other reasons supporting a local franchising requirement. Particularly in light of the generous standard by which this Court evaluates the existence of a rational basis for federal legislation, see, *e.g.*, *Sullivan* v. *Stroop*, 496 U.S. 478, 485 (1990); *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980), it is extraordinary for respondents to suggest (Br. in Opp. 7-10) that the FCC's pre-Cable Act policy defines the universe of rational reasons for imposing franchise requirements on cable facilities.[2]

[2] Respondents also cite (Br. in Opp. 10-11) passages from the Cable Act's legislative history suggesting that the premise of local jurisdiction over cable facilities is the use of local streets and rights-of-way. However, the court of appeals held, and respondents do not contest in this Court, that the Cable Act in fact applies local franchising requirements to certain facilities that use no public rights-of-way. Pet. App. 19a-25a. The fact that the legislative history does not explicitly state a rationale for such a franchising requirement does not justify invalidation of the statute on rational-basis grounds. See *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 179 (explaining that "this Court has never insisted that a legislative body articulate its reasons for enacting a statute," particularly "where the legislature must necessarily engage in a process of line-drawing"); *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960) (it is "constitutionally irrelevant" whether the rational reasons for a classification "in fact underlay the legislative decision"); see also *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history.").

Second, the question presented is whether it is rational for Congress to draw a regulatory distinction between facilities that serve commonly, as opposed to separately, owned buildings. It is telling, in that regard, that respondents ignore the fact that the FCC had since its earliest cable regulations embraced a "private cable" exemption for facilities serving commonly owned, controlled, or managed multiple-unit buildings. See Pet. 13 n.10. In addition, the Commission did not apply this "private cable" exemption to private developments with individually owned lots and dwellings, even where a system operated only on private property. See *In re Citizens Development Corp.*, 52 F.C.C.2d 1135, 1137 (1975); see also NCTA Br. 10 n.28 (discussing pre-Cable Act FCC precedents). Thus, contrary to respondents' contention, pre-Cable Act Commission precedent directly supports the disparate regulation of cable facilities that serve separately, rather than commonly, owned buildings.[3]

[3] Respondents err in relying heavily on *In re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983), aff'd *sub nom. New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804 (D.C. Cir. 1984). As respondents note, the FCC in that docket preempted state and local regulation of SMATV facilities. 95 F.C.C.2d at 1235. However, the Commission was

2. Respondents take issue (Br. in Opp. 12-18) with the consumer-protection rationale that Chief Judge Mikva offered (Pet. App. 42a-43a), and the Commission endorsed (*id.* at 50a), to support the "common ownership" requirement. Respondents principally contend (Br. in Opp. 13) that the "common ownership" requirement does not constrain the size of a SMATV facility, because a SMATV operator may evade the requirement by placing a separate satellite dish on each separately owned building, rather than running a wire from one dish to the various buildings.[4]

Respondents, however, quickly reveal the flaw in their own reasoning, by noting that Section 522(6) "escalate[s] the cost of serving separately-owned buildings, from the minor cost of a length of interconnecting cable strand to the major cost of [installing] an entire duplicative satellite headend facility" on each of the buildings. Br. in Opp. 13. If that is the case,

careful to emphasize that "SMATV systems serving one or more multiple unit dwellings under common ownership, control or management * * * are the subject of this proceeding," and that "SMATV systems which are defined as cable television systems by this Commission are not under scrutiny here." *Id.* at 1224 n.3. Thus, *Earth Satellite* says nothing about the justifiability of local regulation of cable facilities serving separately owned, controlled, and managed buildings.

[4] As the FCC made clear in its rulemaking in this case, "the use of wire or cable within the confines of a multi-unit building is not sufficient to bring the service within the jurisdictional bounds of a 'cable' system." *In re Definition of a Cable Television System*, 5 F.C.C. Rcd. 7638, 7640 (1990). If a cable company operates a series of such facilities, without interconnecting the buildings by any physical medium, there is nothing to bring that company within the definition of a cable system.

then the coverage of facilities serving separately owned buildings advances precisely the interest that Chief Judge Mikva and the FCC suggested; it makes it more costly for a SMATV operator to serve a large market of separately owned buildings without triggering the franchise requirements of the Cable Act.[5]

In contrast, Congress could reasonably have concluded that such incentives triggering coverage were less warranted for cable facilities serving commonly owned buildings. The "common ownership" require-

[5] Respondents note that "[t]o maintain that Congress acted rationally to attempt to constrain the size of SMATV systems not subject to local regulatory oversight by imposing the financial hardship of such 'multidish' entry, rather than simply legislating that no SMATV operator may serve more than 'x' number of subscribers without a franchise, is itself irrational." Br. in Opp. 14. That contention, however, misses the point of the rational-basis test. Where economic or social legislation is at issue, Congress does not run afoul of equal protection principles merely because a classification "made by its laws [is] imperfect" or "is not made with mathematical nicety." *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). As this Court has made clear, "[t]he problems of government are practical ones and may justify * * * rough accommodations," *ibid.*, and an Act of Congress may survive rationality review even if it is "to some extent both underinclusive and overinclusive." *Vance* v. *Bradley*, 440 U.S. 93, 108 (1979). Thus, respondents may be entirely correct (Br. in Opp. 29) that Section 522(6) might require the franchising of a facility serving 75 subscribers in separately owned buildings, while exempting a facility serving 1000 subscribers in a single building. But that possibility has no effect on the constitutionality of the Act, which depends on whether it is plausible to think that a facility serving commonly owned buildings is more likely to serve a smaller group of subscribers.

ment is itself apt to place a relative constraint on the size of the market served by a cable facility, because the Act's franchise requirements will be triggered if the facility expands to serve subscribers whose dwellings are not under the same ownership, control, or management. Under this Court's cases, see, *e.g.*, *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106 (1949), that plausible distinction between facilities serving commonly, as opposed to separately, owned buildings is ample to sustain the rationality of the challenged classification.[6]

[6] Respondents also contend that the consumer protection rationale is undermined because the Cable Act generally exempts facilities using nonphysical transmission media. Br. in Opp. 15-18. They argue that if Congress sought to protect consumers by regulating facilities with a larger subscriber base, "it makes no sense that Congress did not also seek to restrict the market size of locally unregulated 'wireless' operators." Br. in Opp. 16. The court of appeals, however, declined to reach the question whether there is a rational basis for exempting wireless facilities while regulating facilities that interconnect separately owned buildings through physical transmission media. Pet. App. 3a. Respondents' argument is, therefore, a thinly cloaked effort to raise an issue not properly before this Court.

In any case, respondents err in contending that if Congress chooses to regulate some types of facilities with a large subscriber base, it must regulate them all. See, *e.g.*, *Flemming* v. *Nestor*, 363 U.S. at 612 ("it is * * * constitutionally irrelevant * * * that the [statute] does not extend to all to whom the postulated rationale might in logic apply"); *United States* v. *Petrillo*, 332 U.S. 1, 8 (1947) ("it is not within our province to say that, because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power"). As Chief Judge Mikva suggested, there is a rational basis for

3. Respondents next contend that this case does not merit review because the court of appeals applied the proper standard of review under the rational basis test. Br. in Opp. 21-25. According to respondents, the court was not asking the FCC to create a record to support the statute, but was merely seeking its help in conceiving of facts that might support it. *Id.* at 23.

As we have explained (Pet. 12-13), the court of appeals did not follow this Court's precedents holding that a rational basis need not be reflected in a legislative or administrative record. In its decision remanding the case for the FCC to provide "additional 'legislative facts'" (Pet. App. 36a), the court explicitly stated that "*[o]n the record before us*, we fail to see a 'rational basis'" for the classification. *Id.* at 34a (emphasis added). After the record was returned following the remand, the majority gave no consideration to the substance of the justifications advanced by Chief Judge Mikva and endorsed by the FCC.[7] Rather,

exempting wireless technologies that has nothing to do with the consumer protection rationale; Congress may have been trying to provide a deregulatory incentive to switch to such technologies. Pet. App. 42a. While respondents assert that encouraging facilities to use scarce airwaves is both contrary to federal communications policy and "unwise" (Br. in Opp. 18), it is basic to modern equal protection case law that federal courts have "no power to impose * * * their views of what constitutes wise economic or social policy." *United States R.R. Retirement Board* v. *Fritz*, 449 U.S. at 175.

[7] Respondents assert that the FCC's report on remand was in fact a rejection of the policy underlying the classification, and that the Commission's failure to supplement the justifications proffered by Chief Judge Mikva left the court of appeals "high and dry." Br. in Opp. 23; see *id.* at 19-23. That argument misapprehends the character of rationality review and

the court rejected the reasonable supposition that cable facilities serving separately owned buildings

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the premise of separated powers underlying our government. It is irrelevant whether the FCC was able to add its own set of justifications to those of Chief Judge Mikva; what is pertinent here is that under the rational-basis test a "statutory distinction does not violate the Equal Protection Clause 'if any state of facts reasonably *may be conceived* to justify it.'" *Sullivan* v. *Stroop*, 496 U.S. at 485 (emphasis added) (quoting *Bowen* v. *Gilliard*, 483 U.S. 587, 601 (1987)). Thus, the statute should have been sustained based on the "plausible reasons for Congress' action" (*United States R.R. Retirement Board* v. *Fritz*, 449 U.S. at 179) proffered by Chief Judge Mikva. Contrary to respondents' suggestion (Br. in Opp. 20-21), moreover, it makes no difference whether the classification reflects the Commission's own policy preferences. As the court of appeals (Pet. App. 19a-25a) and Commission (5 F.C.C. Rcd. at 7641-7642) recognized, the Cable Act is clear in covering facilities that interconnect separately owned buildings through physical transmission media. We are aware of no case holding a statute unconstitutional on the ground that an administrative agency has expressed a policy preference different from the one expressed in the plain language of the statute.

In addition, respondents suggest (Br. in Opp. 20-21) that Congress has abandoned the policy at issue, because Congress was made aware of the court of appeals' decision, but did nothing to amend the statute when it later enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. Inasmuch as the court held Section 522(6) unconstitutional on its face, it is difficult to see what purpose would have been served by Congress's reenacting that provision. Indeed, what is more significant is that Congress did not revise the language of Section 522(6) in light of the court of appeals' decision. If anything, Congress's failure to amend the statute to conform to the court of appeals' constitutional ruling suggests that Congress has *not* acquiesced in the lower court's constitutional holding in this case.

are more likely to resemble traditional cable systems, because it had "no basis for assuming this." *Id.* at 4a. Finally, the court refused even to consider Chief Judge Mikva's other justifications because "the FCC has wholly failed to flesh these out." *Ibid.*

Accordingly, contrary to respondents' argument (Br. in Opp. 25), it is clear that the court was not merely looking for help with its lack of imagination for legislative facts. Rather, it sought to have the agency supply it with an articulated or empirical basis to sustain the classification at issue. Such a pursuit, however, cannot be squared with this Court's cases.

4. Finally, respondents ask (Br. in Opp. 27-30) this Court to deny review because they believe that in light of its impact on First Amendment interests, Section 522(6) would not survive heightened equal protection scrutiny on remand. That contention is without merit. The court below never addressed the merits of a heightened scrutiny equal protection claim, and it expressly reserved the question whether such a claim would even be ripe for consideration. Pet. App. 32a. Thus, petitioners would have this Court deny review of a case striking down an Act of Congress on rational-relation grounds—based on their view of a claim that is not before this Court and whose ripeness was not even addressed below.

Passing on the validity of a statute is "the gravest and most delicate duty that this Court is called on to perform," *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.), and the performance of that duty is all the more critical where an Act of Congress has been held invalid under the appropriately

deferential rational-basis standard of constitutionality. The theoretical possibility of respondents' asserting an alternative ground on remand should not insulate such a decision from further review. Cf. *Leathers* v. *Medlock*, 111 S. Ct. 1438, 1447 (1991) (reversing on writ of certiorari a state supreme court's decision invalidating a state statute on First Amendment grounds, and then remanding the case to the state court to consider an equal protection claim previously left open).

In any case, as we have discussed (Pet. 22), further review is particularly important here because the D.C. Circuit seriously misapplied rationality review, and its docket disproportionately involves complex regulatory statutes. Properly deferential application of rational-basis review—in accord with this Court's decisions—is critical to ensure that the federal judiciary does not substitute its views on wise regulatory policy for those of the people's elected representatives. The importance of the correcting the court of appeals' decision therefore far transcends the judgment in this particular case.

* * * * *

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

NOVEMBER 1992

No. 92-865

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

BEACH COMMUNICATIONS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS BEACH COMMUNICATIONS, INC., MANTEL LIMITED PARTNERSHIP, PACIFIC CABLEVISION, AND WESTERN CABLE COMMUNICATIONS, INC.

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November 24, 1992

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Respondents Beach Communications, Inc., MaxTel Limited Partnership, Pacific Cablevision, and Western Cable Communications, Inc. (collectively, "Beach") submit this Supplemental Brief.[1]

ARGUMENT

NCTA'S ATTEMPT TO DIVINE A RATIONAL BASIS FROM THE FCC'S PRE-CABLE ACT REGULATORY POLICY FAILS ON ACCOUNT OF THE NCTA'S DISTORTION OF THAT REGULATORY POLICY.

A. The FCC's Pre-Cable Act Policy Does Not Provide A Rational Basis For The Cable Act's Distinction Between Video Systems Serving Commonly Owned Units And Video Systems Serving Non-Commonly Owned Units.

For purposes of local franchising required by the Cable Communications Policy Act of 1984 ("Cable Act"), 47 U.S.C. §541(b)(1), the court of appeals found no rational basis for the distinction drawn between video systems which use wire to interconnect *commonly* owned build-

[1] Beach received the Petition For A Writ Of Certiorari on October 8, 1992. Thereafter, unbeknownst to Beach, Respondent National Cable Television Association, Inc. ("NCTA") filed a brief in support of the Petition. Under Rule 12.4, NCTA's Brief In Support of the Petition was due 10 days before the due date of Beach's Brief In Opposition, but Beach was not served with NCTA's brief until November 12, three days after Beach was required to file, and did file, its Brief in Opposition. (Counsel for Beach learned of the NCTA brief through the trade press while on an out-of-town business trip on November 12.) Thus, Beach has not had an opportunity to address NCTA's arguments. Rule 15.7 permits a party to file a supplemental brief to address "intervening matter not available at the time of the party's last filing." The NCTA brief constitutes such intervening matter. Moreover, this Supplemental Brief is the only means by which Beach can exercise its right under Rule 12.4 to address all briefs filed in support of the Petition.

ings and systems which use wire to interconnect *separately* owned buildings, 47 U.S.C. §522(6), and struck down that distinction as violating the equal protection guarantee of the Fifth Amendment. According to Respondent National Cable Television Association ("NCTA"): "The differing treatment accorded by Congress makes sense, based on the [Federal Communications] Commission's experience with commonly owned SMATVs and its reluctance to treat them as cable systems." NCTA Brief at 10.[2] NCTA argues that Congress intended to adopt the FCC's pre-Cable Act policy relating to SMATV, and that an examination of that policy reveals a rational basis for the discriminatory classification. NCTA Brief at 10. In fact, the FCC's pre-Cable Act policy with respect to SMATV offers no rational basis to support the arbitrary distinctions drawn by the Cable Act. Brief In Opp. at 7-10.

The FCC's pre-Cable Act policy with respect to franchising of *SMATV* systems begins and ends with *In Re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983) ("*ESCOM*"), *aff'd sub nom. New York State*

[2]SMATV uses a satellite receiving station and retransmission equipment, located wholy on private property, to obtain video programming signals transmitted by satellite, which are then converted and distributed by cable to tenants of the building or buildings served. *See New York State Commission On Cable Television v. Federal Communications Commission*, 749 F.2d 804, 806 (D.C. Cir. 1984) ("*NYSCCT*"). Thus, SMATV includes "wholly private" systems and "external, quasi-private systems," but not "internal systems." *See* Respondents' Brief In Opp. at 3-4 describing the nomenclature used by the court of appeals to identify the various video distribution systems at issue. MATV, or master antenna television, consists of a television antenna, usually located on the rooftop of a multiunit dwelling, which captures *only* over-the-air, broadcast television signals for delivery to tenants of the building and which obviates the need for individual antennas per tenant, an impractical solution for television reception. *NYSCCT*, 749 F.2d at 806. Accordingly, SMATV systems offer the full complement of video programming offered by traditional cable systems, while MATV systems are restricted to retransmission of local broadcast stations.

Commission on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984) ("*NYSCCT*"). In *ESCOM*, the FCC preempted franchising of SMATV systems which make no use of public rights-of-way. *Id.* at 1234. Although the FCC found that local franchising impeded the growth of video delivery systems, *id.* at 1231, limited local regulation over traditional cable systems was justified by their use of public rights-of-way. *Id.* at 1234. Despite the technological similarity between traditional cable systems and SMATV, the FCC exempted SMATV systems from local franchising precisely because they do not use the public rights-of-way. *Id.*

There were no relevant FCC decisions relating to SMATV before the *ESCOM* decision, and Congress passed the Cable Act shortly after that decision and before its affirmance by the D.C. Circuit. Thus, NCTA's invitation to examine pre-Cable Act regulation of SMATV as a means of deducing a rational basis for the distinctions drawn by the Cable Act leads to the invalidation of those distinctions: the pre-Cable Act policy exempted facilities from local regulation based on their non-use of public rights-of-way and took no account whatsoever of whether the facilities being served were commonly or separately managed. Since *ESCOM* dealt with a SMATV system serving a single multiunit dwelling, the FCC did not address franchising of SMATV systems using wire to interconnect more than one multiunit dwelling until after passage of the Cable Act. *In Re Amendment of Parts 1, 63, and 76 of the Commission's Rules*, 58 Rad. Reg. 2d (P&F) 1, *modified*, 104 F.C.C.2d 386 (1986), *aff'd in part and rev'd in part, American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). Therein, the FCC affirmed that "the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not the ownership, control or management." 104 F.C.C. 2d at 397. In its Report to the

D.C. Circuit in this case, the FCC repeated its "policy preference" to exempt from local franchising systems which interconnect separately owned buildings by wire, as long as no public right-of-way is used. App. at 51a.

Contrary to NCTA's suggestion, FCC regulatory policy with respect to *SMATV* offers no rational basis on which to impose local franchising on SMATV systems using wire to interconnect separately owned multiunit dwellings.[3]

B. The FCC's Regulatory Treatment of MATV Systems, Upon Which NCTA Relies, Fails To Justify The Cable Act's Arbitrary Classifications With Respect To SMATV Systems.

While claiming to examine pre-Cable Act policy with respect to SMATV, NCTA actually relies on the FCC's application of the "common ownership, control, or management" language in the *MATV* context. That language was developed almost 30 years ago to distinguish MATV

[3] Although the FCC found that the plain language of the Cable Act compels this result, *Definition Of A Cable System*, 5 F.C.C. Rcd. 7638, 7641 (1990), until now it has never attempted to articulate a rational basis for it, except in its Report to the court of appeals, App. at 50a, wherein it adopted by reference, and without discussion, the bases proffered by Chief Judge Mikva in his concurring opinion. NCTA incorrectly states that the FCC "feared that expressing any additional policy justifications might lead to the court extending the cable system definition to cover facilities, such as those interconnecting *commonly* owned multiple unit dwellings by cable, that the FCC had never considered to be a cable system." NCTA Brief at 6, n.18. In fact, the FCC was not referring to the exemption for interconnection of multiple unit dwellings by cable, but rather to the exemption for *wireless* systems. *See* App. at 50a (citing the court of appeals' discussion of wireless systems found at App. 31a-32a, n.17). In short, the FCC was acknowledging that a system which interconnects non-commonly owned buildings by wire is, for franchising purposes, indistinguishable from a wireless system serving non-commonly owned buildings. As the FCC noted, Congress meant to exclude wireless systems from the franchising requirement, App. at 50a; therefore, under the Fifth Amendment, systems interconnecting buildings by wire must also be exempted.

systems from cable systems, *Rules Re Microwave-Served CATV*, 38 F.C.C. 683 (1965), *aff'd Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968), and subsequently found its way into the Cable Act. The NCTA's approach actually proves the unconstitutionality of the classification at issue here, because the FCC's application of the "common ownership" language in the MATV context offers no rational basis for the disparate treatment of video delivery systems imposed by the Cable Act, despite the similarity of the "common ownership" language.

In 1965, the FCC imposed certain federal regulations upon "CATV systems" which served to retransmit only over-the-air broadcast signals, not satellite signals. 38 F.C.C. at 741. The FCC exempted from federal regulation MATV systems, *i.e.*, any "facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management . . . ." *Id.* at 741. That case marks the beginning of limited *federal* regulation of cable systems, but offers no conceivable basis for imposing local regulation, because local regulation was not at issue. The decision does not provide a rational basis for, or even discuss, its implicit distinction between systems serving a group of apartments under common control and systems serving apartments under separate control.

Similarly, NCTA cites *Cable Television Systems*, 63 F.C.C.2d 956 (1977), and *Cable Television System*, 67 F.C.C.2d 716 (1978), in which the FCC reaffirmed the exemption for MATV, noting that a landlord's use of a master antenna used in common for the reception of broadcast signals is "not a competitive entry into something like cable television service . . . ." *Cable Television System*, 63 F.C.C.2d at 996. NCTA cites this case for the proposition that, as early as 1976, "SMATVs providing service to *non-commonly* owned buildings presumably were believed to fall more on the line of a 'competitive entry' into cable television service," NCTA Brief at

11, as opposed to being mere "amenities," NCTA Brief at 14, thus allegedly justifying the imposition of local franchising requirements. This grossly distorts FCC policy since the case never mentions *SMATV* and does not discuss service to non-commonly owned buildings, even by MATV.[4]

In fact, the FCC and Congress greeted "competitive entry" by SMATV systems by *prohibiting* the imposition of local franchising requirements upon them. *ESCOM*, 95 F.C.C.2d at 1231 (preempting local franchising of SMATV as a means of "creating a more diverse and competitive telecommunications environment"). *Id.* at 1231-35. As Congress noted in adopting the Cable Act:

> [T]his bill does not affect the authority of a state or local political subdivision to license or regulate an SMATV system which does not use public right-of-way. Recently the FCC sought to preempt state regulation [citing *ESCOM*]. The committee does not intend anything in this title to affect the FCC's decision, or to affect any review of this decision by the courts.

H. Rep. No. 934, 98th Cong., 2d Sess. 63 (1984) *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655 ("H. Rep."). By adopting *ESCOM*, Congress recognized that a SMATV system serving a *single* multiunit dwelling represented competitive entry, and exempted such a system from local franchising. Since competitive entry justified an exemption from local franchising, it cannot be a conceivable basis for the imposition of franchising.[5]

[4]The decision's omission of any reference to SMATV is understandable given that the advent of SMATV did not occur until around 1979 when the FCC deregulated the licensing of the satellite receive-only antennas necessary to pick up SMATV programming. *See ESCOM*, 95 F.C.C.2d at 1231 citing *Regulation of Domestic Receive-Only Satellite Earth Stations*, 74 F.C.C.2d 205 (1979).

[5]Congress' adoption of *ESCOM* belies NCTA's conclusory statement that Congress might have believed that systems serving

[footnote continued]

Congress did not intend "competitive entry" to be the basis for local franchising of *wireless* systems serving non-commonly owned buildings. *Definition Of A Cable Television System*, 5 F.C.C. Rcd. at 7638-39; *see In Re Orth-O-Vision, Inc.*, 69 F.C.C.2d 657 (1978), *recon. den'd*, 83 F.C.C.2d 179 (1980), *pet. for review den'd sub nom. New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982) (exempting wireless systems located wholly on private property from local franchising as a means of encouraging competitive development of wireless technology). Nor did Congress intend to impose franchising in the event of "competitive entry" by a SMATV operator who interconnects non-commonly owned buildings by radio or who serves numerous, non-commonly owned buildings by installing separate facilities at each property. *Definition Of A Cable Television System*, 5 F.C.C. Rcd. at 7639-40. Congress exempted these alternative delivery systems, all of which make no use of the public rights-of-way, from local franchising as a means of encouraging competition with traditional cable operators. *Id.* at 7639, citing H. Rep. at 22-23, and citing S. Rep. 67, 98th Cong., 1st Sess. 30 (1983). Since competitive entry was the basis on which alternative video delivery systems were *exempted* from local franchising, it cannot be a conceivable basis for *imposing* a franchise requirement.[6]

non-commonly owned buildings are more likely to "share the attributes of" traditional cable systems and therefore should be subject to local franchising. NCTA Brief at 13. To the contrary, Congress adopted *ESCOM*'s reasoning that the attributes which traditional cable operators share with video delivery systems located wholly on private property do *not* justify the imposition of local franchising on the latter since no use of the public right-of-way is made. *See supra* at 3.

[6]Although Congress intended to exempt these alternative systems from local franchising, all of them remain subject to extensive federal regulation. Therefore, NCTA is inaccurate when it repeatedly states that the effect of the court of appeals' decision

[footnote continued]

The latter *Cable Television System* decision does note that the MATV exception to the cable system definition is based, in part, on the inefficiency of regulating smaller systems. 67 F.C.C.2d at 726. Yet the decision does not explain how the "common ownership" language furthers this purpose. There is no suggesting that a system serving apartments which are commonly controlled is likely to have fewer viewers than a system serving apartments that are separately controlled.

As applied in the Cable Act with respect to *SMATV*, it is inconceivable that Congress included the "common ownership" language as a means of imposing the local franchising requirement on the basis of system size, in light of the fact that the Act does not prohibit a video provider from serving an infinite number of subscribers without obtaining a franchise. The Act does not even prohibit a SMATV provider from serving non-commonly owned buildings without a franchise; it merely prohibits the interconnection of those buildings by cable. The provider is free to offer service to a limitless number of multiunit dwellings by interconnecting them with radio waves, or by installing and operating separate systems on each property served. Likewise, under the Cable Act a single video provider can serve every tenant of every multiunit dwelling in the nation and never obtain a franchise, if the provider simply uses a wireless system and makes no use of the public rights-of-way. Congress's exemption of wireless systems from the franchise requirement regardless of the number of dwellings served proves that the cable system definition cannot conceivably have been intended to impose franchising on the basis of system size.[7]

is to increase the number of "unregulated" video delivery providers. *See* NCTA Brief at 11-12, 14, 15.

[7] NCTA avoids a discussion of the franchising exemption for wireless systems on the grounds that neither the court of appeals

[footnote continued]

NCTA cites three additional FCC cases holding that the cable system definition included MATV facilities which made no use of public rights-of-way. NCTA Brief at 10, n. 28 citing *Notice of Proposed Rulemaking in Docket No. 20561,* 54 F.C.C.2d 824 (1975) (MATV facilities serving planned communities); *Citizens Development Corp.,* 52 F.C.C.2d 1135 (1975) (MATV facility serving single family homes in private community); *Bayhead Mobile Home Park,* 47 F.C.C.2d 763 (1974) (MATV facility serving mobile home park). These cases were decided when the exception to the cable system definition exempted facilities serving "one or more apartment dwellings under common ownership, control, or management," and thus simply stand for the proposition that "apartment dwellings" do not include single-family homes or mobile home parks. They offer no rational basis to distinguish separately owned multiunit dwellings from commonly owned ones for purposes of requiring a local franchise.[8]

Thus, NCTA's observation that the arbitrary franchising requirements created by the Cable Act are "firmly grounded in FCC precedent," NCTA Brief at 14, misses

nor Petitioners addressed that issue. NCTA Brief at 5, n.13. NCTA is correct that the exemption for wireless operators is settled law, *Definition Of A Cable Television System,* 5 F.C.C. Rcd. at 7638-39, and has not been challenged in this case. But these are not reasons to ignore the exemption. Indeed, the absolute exemption for wireless systems, regardless of system size, proves that the congressional line-drawing contained in the Cable Act was not based on a desire to impose franchising on those systems of larger size.

[8] Similarly, NCTA mistakenly relies on the *post*-Cable Act decision in *Massachusetts Community Antenna Television Commission,* 2 F.C.C. Rcd. 7321 (1987), *appeal dismissed sub nom. Channel One Systems, Inc. v. FCC,* 848 F.2d 1305 (D.C. Cir. 1988), in which the FCC found that "multiple unit dwellings" do not include planned unit developments including single family homes, but again offered no rational basis to distinguish between video facilities serving separately owned dwellings and video systems serving commonly owned dwellings.

the point that such precedent did not involve SMATV, but rather MATV, and was silent with respect to any rational basis for discriminatory treatment of video systems serving separately owned dwellings.

CONCLUSION

Beach has shown herein and in its initial brief that the two "conceivable" bases proffered below to justify the distinction between wired video systems which interconnect commonly owned versus non-commonly owned buildings, *i.e.*, an intent to impose franchising on larger video systems, and an intent to encourage the use of radio waves, are not rational bases for the discriminatory classification. The distinctions drawn by the Cable Act cannot be justified on the basis of alleged governmental interests that are not furthered by the classification or that conflict with actual federal policy. Given the absence of a conceivable basis on which to distinguish systems using wire to interconnect commonly owned buildings and systems using wire to interconnect non-commonly owned buildings, the court of appeals properly ruled that the distinction does not withstand equal protection scrutiny under the Fifth Amendment. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

For the foregoing reasons, Beach respectfully requests that the Court deny the Petition For Writ Of Certiorari.

Respectfully submitted,

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November 24, 1992

No. 92-603

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

BEACH COMMUNICATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED OCTOBER 7, 1992
CERTIORARI GRANTED NOVEMBER 30, 1992

TABLE OF CONTENTS [1]

[1] The following items were printed in the petition appendix and are not reprinted herein: (1) the June 9, 1992, opinion of the court of appeals upon return of record from the Federal Communications Commission; (2) the March 6, 1992, opinion of the court of appeals remanding the case to the Commission; (3) the May 5, 1992, report of the Federal Communications Commission.

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 91-1089

BEACH COMMUNICATIONS, INC., MAXTEL LIMITED PARTNERSHIP, PACIFIC CABLEVISION AND WESTERN CABLE COMMUNICATIONS, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

SPECTRADYNE, INC., NATIONAL CABLE TELEVISION ASSOCIATION, INC., WIRELESS CABLE ASSOCIATION, INC., SOUTHWESTERN BELL CORPORATION, HUGHES COMMUNICATIONS GALAXY, INC., INTERVENORS

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
(M) 02-19-91	Petitioner's petition for review of an order of the FCC (m-19) [11]
	• • • •
(M) 02-27-91	5—Motion of BellSouth Corporation, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company for leave to intervene (m-27) [11]
(M) 03-05-91	5—Motion of Spectradyne, Inc. for leave to intervene (m-5) [11]
(M) 03-18-91	5—Motion of National Cable Television Association, Inc. for leave to intervene (m-18) [11]

(M)03-19-91	5—Motion of Wireless Cable Association, Inc. for leave to intervene (m-19) [11]
(M)03-19-91	5—Motion of Southwestern Bell Corporation for leave to intervene (m-21) [11]
(M)03-19-91	5—Motion of Hughes Communications Galaxy, Inc. for leave to intervene (m-21) [11]
	* * * *
(M)03-28-91	Clerk's order granting interventions.
	* * * *
(M)04-11-91	CERTIFIED INDEX TO RECORD
	* * * *
(E)05/09/91	5—Motion of BellSouth Corporation (BellSouth Companies) to Withdraw as Intervenor. (m-09) [11]
	* * * *
(E)06/10/91	Clerk's order of BellSouth Corporation, Southern Bell Telephone, *et al.*'s Motion to withdraw as Intervenor and no opposition thereto having been received, it is ORDERED that BellSouth Corporation, Southern Bell Telephone, *et al.*'s Motion to Withdraw as Intervenor be granted, and the Clerk shall note the docket accordingly.
	* * * *
(N)12/09/91	ARGUED BEFORE: Mikva, Chief Judge and Edwards and D.H. Ginsburg, Circuit Judges. The Court granted both counsels leave to file supplemental brief, not more than 5-pages.
(M)12-16-91	5—Petitioners' motion to remand (m-16) [8]
	* * * *
(M)12-20-91	5—Respondents' opposition to petitioners' motion for remand (m-20) [8]
(Z)12-26-91	Per Curiam order that the motion to remand be denied. AJM, HTE, DHG

DATE	FILINGS—PROCEEDINGS
(cb)3-6-92	Opinion for the court filed by Circuit Judge Edwards denying petition for review in part, dismissing in part and remanding record in part for supplementation: separate concurring statement filed by Chief Judge Mikva.
(M)05-05-92	5—Respondent's report in response to opinion of 3/6/92 (m-5) [1]
(cb)6-9-92	Opinion for the Court filed Per Curiam. Chief Judge Mikva dissenting.
(cb)6-9-92	Judgment for the Court that the petition for review is granted in part (June 9, 1992), denied in part and dismissed in part (March 6, 1992), all in accordance with the Opinion for the Court filed herein this date.
(cb)6-9-92	Order delaying mandate.
(LB)07-31-92	MANDATE ISSUED.
(M)09-02-92	Letter from Clerk's Office, US Supreme Court dated 9/1/92 advising that application for extension of time within which to file petition for writ of certiorari has been presented to the Chief Justice who on 9/1/92 signed an order extending the time to and including 10/7/92. [1]
(M)10-13-92	Notice dated 10/7/92 from Clerk's Office, US Supreme Court of filing of petition for certiorari. [1]
(M)11-09-92	Copy of respondent's brief in opposition to petiton for writ of certiorari received from Beach Comm. (p-9) [11]
(M)11-24-92	Copy of respondent's supplemental brief received from Beach Comm. [on petition for writ of certiorari] (p-24) [11]

DATE	FILINGS—PROCEEDINGS
(M) 12-02-92	Certified copy of S.Ct. order granting writ of certiorari to US Ct. Appeals for DC Cir. dated 11/30/92 [1]

• • • •

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 89-35

IN THE MATTER OF

DEFINITION OF A CABLE TELEVISION SYSTEM

REPORT AND ORDER

(Proceeding Terminated)

Adopted: October 11, 1990: Released: December 21, 1990

By the Commission

I. INTRODUCTION

1. The Commission issued the *Notice of Proposed Rule Making* in this proceeding [1] to clarify its interpretation of the statutory term "cable system" as defined in the Cable Communications Policy Act of 1984.[2]

2. A cable system is defined in section 602(6) of the Cable Act and in section 76.5(a) of the Commission's rules as

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide

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[1] 4 FCC Rcd 2088 (1989).

[2] Pub. L. No. 98-549, 98 Stat. 2779 (1984).

> cable service which includes video programming and which is provided to multiple subscribers within a community . . .

These same sections exclude from the definition

> a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way.

3. In adopting rules to implement the Cable Act in 1986, the Commission had concluded, based on certain legislative history of the Act, that when multiple unit dwellings are involved, the distinction between a cable system and other types of video distribution systems rested solely on whether or not the facilities used any public right-of-way.[3] Decisions by two federal district courts, however, raised significant questions about this and other prevailing interpretations of the Act. In *City of Fargo v. Prime Time Entertainment, Inc.*,[4] the court determined that a television distribution system within a building became a cable system when it was connected by infrared transmissions with a video distribution system in a second building, because the two buildings were not commonly owned, controlled, or managed. In *Pacific & Southern Co., Inc. v. Satellite Broadcasting Networks, Inc.*,[5] the court suggested that the interception of local television broadcast signals and their national retransmission via space satellite to individual home satellite-receive facilities could constitute a cable television system within the meaning of Section 602(6) of the Communications Act.

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[3] *Cable Communications Act Rules (Reconsideration)*, 104 FCC 2d 386, 396-97 (1986).

[4] Case No. A 3-87-47 (D.N.D. March 28, 1988) (unpublished).

[5] 694 F. Supp. 1565 (N.D. Ga. 1988).

4. To clarify these issues we sought coment on whether facilities serving multiple unit dwellings that do not use public rights-of-way might in some instances be cable systems within the Act's definition. We further sought comment on the broader implications of treating facilities connected only by radio (or infrared) transmissions and making use of no other interconnecting wires or cables as cable systems. Twenty-three parties filed comments and thirteen parties filed replies in response to the *Notice*.

II. SUMMARY OF CONCLUSIONS

5. After carefully considering these comments, we conclude that the term cable system as used in the Act encompasses only video delivery systems that employ cable, wire, or other physically closed or shielded transmission paths to provide service to subscribers and only those that use such technology outside individual buildings. Radio services that do not use such closed transmission paths at all (or if they do, systems using such technology only inside individual buildings), including direct broadcast satellites and so-called "wireless cable" (multipoint distribution service (MMDS), instructional fixed television service (ITFS), and operational fixed service (OFS) facilities), are therefore not cable systems under the Act. Satellite master antenna systems (SMATV) and master antenna systems (MATV) that use wire or cable only within the premises of a single multiple unit building are not cable systems. MATV or SMATV systems serving more than one multiple unit dwelling interconnected only by radio or infrared facilities also are not cable systems. Finally, if multiple unit dwellings are connected to each other by physically closed transmission paths, such SMATV or MATV systems are cable systems unless the buildings are under common ownership, control, or management and do not use public rights-of-way. The basis for each of these conclusions is discussed in detail below.

III. DISCUSSION

A. "Closed Transmission Path" Requirement

6. *DBS, MMDS, and Other Radiating Technologies Excluded.* In the *Notice*, we expressed our tentative view that Congress did not intend to include radio transmission services, such as DBS and MMDS, within the Act's definition of a cable system. We also expressed our concern that the referenced court decisions "could presage other possible inapt extensions of the definition [of a cable system] that would require the treatment of additional wireless video delivery systems as cable systems as well." After considering the comments directed to this issue, we conclude that our initial view was correct.

7. As indicated above, the statutory definition contains a threshold requirement that a cable system involve facilities consisting of a set of "closed transmission paths." The term closed transmisison path is not defined in the Act, and the House Report does not directly discuss the meaning of this term. However, the Senate version of the Cable Act used a very similar term—"closed transmission mediums"—in its definition of a cable system. That term was to be statutorily defined as

> media having the capacity to transmit electromagnetic signals *over a common transmission path such as coaxial cable, optical fiber, wire, waveguide, or other such signal conductor* or device . . . .[6]

The original Senate version of the Cable Act thus made explicit that, by referring to a "closed" transmission medium, the drafters contemplated that cable system facilities would use physically closed or shielding conducting media or "transmission paths," rather than radio waves alone. While the original Senate version of the Cable Act

[6] S. 66. Section 603(11) (emphasis added). S. Rep. 98-67, 98th Cong., 1st Sess. 35 (1983).

was not passed, we have no basis for thinking that the Senate and House did not share a common understanding of the virtually identical terms "closed transmission path" and "closed transmission media" (which itself was defined as a "transmission path") that were used in their respective definitions of cable systems. Indeed, the term "cable" itself is commonly defined by dictionaries as an insulated "electrical conductor," which tracks the Senate's reference to "signal conductors" when defining cable as a closed transmission medium. In the absence of any evidence in the legislative history to the contrary, the Senate language is highly probative of the congressional intent underlying the statute's use of the term "closed transmission path" to define a cable system.

8. Our interpretation is further supported by passages in the Senate and House Reports that use virtually identical language when referring to types of video delivery systems including MATV, SMATV, MDS, DBS, and STV, that both bodies understood to be different from cable systems. The House Report, for example, stressed that

> in adopting this legislation, the Committee is concerned that Federal law not provide the cable industry with an unfair competitive advantage in the delivery of video programming. National communications policy has promoted the growth and development of *alternative delivery systems* for these services, *such as DBS, SMATV and subscription television.* The public interest is served by this competition, and it should continue.[7]

Similarly, the Senate Report on S. 66 (the original Senate version of the Cable Act), pointed out that cable faces

[7] H.R. Rep. 98-934, 98th Cong., 2d Sess. 22-23 (1984) (emphasis added).

major competition from such services as MDS, MATV, SMATV, DBS, STV "and other media." [8]

9. In short, both bodies of Congress expressed virtually identical views concerning the types of services—DBS, MDS, and STV—that were not considered cable system. All of these services used radio waves (without physical conduction media or devices) and thus stand in sharp contrast to the "closed transmission paths" referred to in both the Senate and House versions of the Act.

10. In addition, the very structure of the Cable Act as a whole clearly contemplates a regulatory system where there is a strong nexus with individual local communities through the franchise process. Such a nexus is clearly absent, for example, in the direct broadcast satellite situation, which further suggests that inclusion of radio based video distribution systems within the cable system definition was not intended. As a number of commenting parties point out, alternative delivery systems such as MDS and DBS could not practically be regulated under the statutory scheme adopted in the Cable Act. The dual federal-local jurisdictional approach to regulating cable television service is largely premised on the fact that cable systems necessarily involve extensive physical facilities and substantial construction upon and use of public rights of way in the communities they serve.

11. Furthermore, this interpretation of the term is consistent with the Commission's own view of the physical characteristics of cable systems, as evidenced by its decisions and rules prior to enactment of the Cable Act. While the Commission's initial 1965 definition's reliance upon "redistribut[ing] . . . signals by wire or cable . . . ." [9]

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[8] S. Rep. 98-67, 98th Cong., 1st Sess. 30 (1983).

[9] *First Report and Order in Docket Nos. 14895 and 15233*, 38 FCC 683, 741 (1965). *See also Second Report and Order in Docket 15971*, 2 FCC 2d 725, 729, 793-94 (1966), in which the Commission exercised jurisdiction over cable as "communication by wire," defined in Section 3(a) of the Act as transmissions "by aid of wire, cable, or other like connection . . . ." *Compare* Section 3(b), defining "radio communication" as "transmission by radio . . . ."

was amended in 1977 to eliminate reference to "by wire or cable," [10] the Commission specifically stated that this change was not intended to be "interpreted to include such non-cable television broadcast station services as Multipoint Distribution Systems . . . ." [11] In enacting the Cable Act, Congress acted against a background of almost thirty years of Commission regulation in the cable area, and commenters have offered no evidence that it intended to alter in any fundamental way the basic meaning of the term "cable system" as reflected in prior Commission decisions and as applied to these alternative radio frequency using services. Absent such evidence, we shall not infer that Congress intended a definition of the term that is significantly different in these respects from the Commission's prior understanding.[12]

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[10] *First Report and Order in Docket 20561*, 63 FCC 2d 956 (19—).

[11] *Id.* at 965. The change appears to have anticipated the possibility of optical fiber transmission paths replacing traditional coaxial cable distribution plant.

[12] *Cf. City of New York v. FCC*, 486 U.S. 57 (1988). In view of our conclusions above, we reject the argument of the National Cable Television Association, Community Antenna Television Association, City of Chicago, and Association of Independent Television Stations that point-to-point radio transmission (as distinguished from point-to-multipoint) should be treated as closed transmission paths. There is no support for this position in either the Cable Act, its legislative history, or our precedents. We do not, however, suggest that cable facilities must use physically enclosed transmission path exclusively in order to retain their status as cable systems. Obviously, many cable systems utilize point-point microwave radio links in addition to wire or cable to relay programming to the cable community, to pick up programming from remote locations within the community, and to connect headends and subheadends within the area served. Use of such radio facilities clearly does not remove

12. *MATV and SMATV Systems.* As discussed above, the Cable Act's definitional reference to "closed transmission paths" requires that a video delivery system consist of some type of physically closed transmission path to subscribers, such as wire, cable, or fiber optics, before it may be deemed a cable system; transmissions by radio alone do not satisfy this criterion. "Traditional" cable systems, that are within the definition, use coaxial cable laid under city streets or along telephone or electric utility lines.[13] However, large apartment buildings also may use coaxial cable to distribute programming within the confines of a single building. Specifically, a master antenna television (MATV) system uses a single antenna to capture a radio signal off the air and deliver it to tenants in a multiple unit building using coaxial cables that run throughout the building. Similarly, a satellite master antenna (SMATV) system receives radio signals transmitted by satellite to an earth station atop a multiple unit building and distributes the signals through an MATV system within the building.

13. In the *Notice*, we requested comment on whether SMATV systems might be considered cable system and expressed the tentative view that they were not. In addressing this matter, we consider first the applicability of the definition to such operations using cables internally but connected externally by radio communications (satellite, microwave, infrared, or other non-closed communications systems) and, second, to such operations connected by external cables. As explained below, we conclude that neither MATV nor SMATV systems as such are covered by the Cable Act as cable systems, but that such facilities may become cable systems if they consist of

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what is otherwise a cable system from the coverage of the definition because the connected parts of such facilities would be independently covered by the definition.

[13] *See New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984).

multiple buildings interconnected by cable. Specifically, we find that SMATV or MATV buildings connected by radio communications are not cable systems because they do not use "closed transmission paths" within the meaning of the statutory definition.[14] By contrast, SMATV or MATV buildings interconnected by cable or wire will be considered cable systems, unless they fall within the private cable exemption discussed below.

14. Whether the Cable Act's definition of a "cable system" was intended to include MATV and SMATV systems can best be discerned by examining both the legislative history of the provision and Commission precedents existing at the time the Act was passed. In this regard, it is relevant that by the time the statutory language was drafted, the Commission already had exempted SMATV and MATV systems from its definition of a cable system. This exclusion was reflected both in the original definition enacted in 1965 and in the subsequent clarification enacted in 1977. Specifically, the 1965 definition excluded a facility "which serves only the residents of one or more apartment dwellings under common ownership, control or management." [15] The 1977 definition excluded a facility "that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control or management." [16]

15. Section 602(6) of the Cable Act contains a virtually identical exclusion in the statutory definition of a cable system.[17] Significantly, there is no evidence in the

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[14] As we explain below, this is so even though these systems use cables within individual buildings.

[15] 38 FCC at 741.

[16] 63 FCC 2d at 965.

[17] We note that the statutory definition contains a requirement that facilities within the exemption for multiple unit dwellings not use any public right-of-way, a requirement that was not included in the Commission's pre-existing defintion of a cable system. This

legislative history that Congress intended for the same words to have a different meaning than had previously been ascribed to them by the Commission.[18] We accordingly conclude that pre-existing Commission precedents should be used to determine how various types of SMATV and MATV operations should be treated under the Cable Act. As discussed more fully below, those precedents establish that the use of wire or cable solely within a building's premises did not make a SMATV or MATV operation a "cable system" for jurisdictional purposes. As a result, neither single-building SMATVs or MATVs, nor multi-building SMATVs or MATVs interconnected solely by radio communication, were deemed to be cable systems by the Commisison even when the buildings were not commonly controlled, owned, or managed.

16. The starting point in our analysis is those cases recognizing that a SMATV's or MATV's use of wire or cable only within the premises of a building is fundamentally different than use of cable as a medium of communications outside a building, both from a state and federal jurisdictional standpoint. In 1975, when interpreting its cable definition and exclusions, the Commission addressed the exemption for multiple unit dwellings by emphasizing that "there is a real and effectual difference between *a single structure that has been wired to provide antenna service* to its component residences, and an *externally wired community* of individual homes." [19]

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additional statutory requirement appears to be related mainly to Commission decisions and policies regarding its preemption of state regulation of SMATV and MATV facilities. *See* Section 621(e) of the Act and the discussion at paragraph 29 below.

[18] The legislative history does not provide precise guidance except to make clear that SMATV and MATV system generally are excluded from the definition of a cable system. *See* S. Rep. 98-67, 98th Cong., 1st Sess. 18-19 (1983); H.R. Rep. 98-934, 98th Cong., 2d Sess. 44 (1984).

[19] *Notice of Proposed Rule Making in Docket 20561*, 54 FCC 2d 824, 826 (1975) (emphasis added).

The Commission also noted its expectation that as to such internally wired buildings "[b]ecause no use is made of local rights-of-way before commencing operation." [20] As a result, such systems were not deemed to be cable systems for jurisdictional purposes.

17. In a subsequent *Report and Order*, the Commission further explained that the term "subscriber" in the cable definition "includes the occupants of one or more multiple occupancy buildings" if that "*MATV system is interconnected in a cable television system.*" [21] The Commission thus again expressed its understanding that MATV subscribers would not be "cable" subscribers unless the internal MATV system was interconnected with and part of a "cable" system. On reconsideration in that same proceeding, moreover, the Commission flatly rejected arguments that a MATV system should be considered a cable system "because it makes no regulatory difference whether a cable systems is high-rise or low-rise, detached or unattached, multi-family or otherwise." The Commission declined even to exercise jurisdiction, finding MATV "a different entity for regulatory purposes" and reiterated its view that "MATV systems [are] substantially different from traditional cable systems so as to justify continued exemption from our regulations . . . ." [22]

18. These decision made clear that the use of wire or cable within the confines of a multi-unit building is not sufficient to bring the service within the jurisdictional bounds of a "cable" system. Consistent with this fundamental understanding, we have discovered no cases prior to the Cable Act in which the Commission ever treated MATV and SMATV buildings as cable systems unless

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[20] *Id.* at 835.

[21] *Report and Order in Docket 20561*, 63 FCC 2d 956, 966 (1977) (emphasis added).

[22] *Memorandum Opinion and Order in Docket 20561*, 67 FCC 2d 716, 725 (1978).

the individual buildings were interconnected to each other by wire or cable. Conversely, where MATV buildings were connected by radio alone, the Commission did not treat the facilities as cable systems, even where the buildings were not commonly-owned and thus were not within the exemption for multiple unit dwellings.

19. The *Video International Productions, Inc./Cable Dallas* cases, for example, illustrate the type of SMATV system that the Commission viewed as a cable system.[23] In those cases an applicant sought to demonstrate that it was a cable system.[24] It provided SMATV service to several groups of apartment buildings and none of the buildings was under common ownership, management, or control. Each building within a group, however, was interconnected with cable transmission lines. Although none of the buildings was commonly owned and each building was served internally by a MATV system, the Bureau and Commission decisions left no doubt that these factors alone were insufficient to bring the system within the definition of a cable system. The Bureau decision held that

> each group of buildings *interconnected with cable transmission lines* constitutes a separate cable system to which CARS service is permissible under . . . the Rules. . . . The fact that each of the apartment buildings served may own the *terminating cable pathways within its confines* is not determinative of [the applicant's] status as a cable television system. It is the *interconnection* of each separately owned

[23] *Video International Productions, Inc.*, (Cable Television Bureau, May 12, 1981); *Cable Dallas, Inc.*, (Cable Television Bureau, May 18, 1982), *review denied*, 93 FCC 2d 20 (1983).

[24] The applicant (Cable Dallas) was seeking a cable television relay service (CARS) authorization. To be eligible for a CARS radio license, it was required to own or manage and operate a cable television system. *See* 47 C.F.R. Section 78.13.

> apartment building which qualifies [the applicant] as a cable television system.[25]

In addition to making clear that the wiring within a single multiple unit dwelling did not render a SMATV system a cable system, the Bureau clearly indicated that, for a group of SMATV apartment buildings not under common ownership to be a "cable" system, the buildings must be interconnected by "cable." Indeed, the Commission's rule required that the microwave relay authorization in question could only be awarded to cable system applicants. As a practical matter, this requirement foreordained that the threshold interconnection of SMATV buildings to establish a cable system could be accomplished only by wire and not by radio links. Subsequently, in a related case involving the same system, the Commission confirmed that it was the physical interconnection of each individual building by cable that rendered the system a cable system.[26]

20. Conversely, and prior to *Cable Dallas*, the Commission had made clear that non-commonly owned MATV apartment dwellings in a system connected by a radio microwave multipoint distribution service (MDS) is not a cable system. In *Orth-O-Vision*,[27] the Commission preempted state regulation of a system serving 35, separately owned MATV apartment houses connected by MDS and left no doubt that it did not view the MDS connected MATV systems as cable services. The Com-

[25] *Video International Productions, Inc., supra* at 2 (emphasis added).

[26] *Cable Dallas, Inc.*, 93 FCC 2d 20 (1983).

[27] *See Ortho - O - Vision, Inc.*, 69 FCC 2d 657 (1978), *recon. denied*, 82 FCC 2d 178, 183 (1980), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2nd Cir. 1982). *See also Earth Satellite Communications, Inc.*, 95 FCC 2d 1223 (1983), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984).

mission distinguished its preemption of the services at issue from its prior decision to relinquish to the state "franchising jurisdiction" over cable. It observed that "cable television, by its very nature, makes significant use of public streets and rights-of-way" and thus the cable precedent did "not in any way qualify [the FCC's] jurisdiction over other forms of interstate communication. . . ."[28] Similarly, when preempting state regulation of a SMATV service in *Earth Satellite Communications, Inc.*[29] ("ESCOM"), the Commission cited the *Cable Dallas* decision as indicative of the types of SMATV systems that could be defined as cable systems. As noted above, the Commission had concluded in *Cable Dallas* that SMATV buildings interconnected by cable are within the Commission definition of a cable system.

21. Based on the foregoing, we believe that the Commission's precedents prior to the Cable Act established principles that: (1) use of wire or cable solely within a building's premises did not trigger jurisdiction over the system as a wire or cable communications service, (2) MATV or SMATV systems contained within a single building were not cable systems, and (3) where two or more multiple unit dwellings were served by MATV or SMATV systems that were connected by radio transmission facilities alone, the systems were not cable systems, even though the several buildings were not commonly owned, controlled, or managed.[30] Since there is no

[28] 82 FCC 2d at 183.

[29] 95 FCC 2d 1223, n. 3 (1983), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984).

[30] Although there are no decisions expressly addressing the status of MATV or SMATV buildings connected by infrared transmissions, we have no reason to conclude that the result would be any different in those circumstances. The Commission's decisions do not suggest that the mere use of wire or cable within SMATV or MATV equipped buildings would be sufficient to qualify systems as "cable"

indication in the Cable Act or its legislative history that the congressional drafters intended to upset these prior principles, we conclude that they should be applied when applying the statutory definition of a "cable system." As previously noted, that definition states that a facility must use a set of "closed transmission paths" in order to be considered a cable system for purposes of the Act. We believe that this language should be interpreted to mean that facilities which use wire solely *within* a building are not "cable" systems under the Act.[31] Stated differently, we conclude that the "closed transmission path" requirement of the statute contemplates that wire or cable must be used outside the premises of MATV and SMATV buildings before the facilities may be deemed a cable system under the statutory definition.

22. Accordingly, single building MATV or SMATV systems will not be considered "cable systems," for purposes of the Cable Act or our rules, since such systems do not use wire outside the building.[32] Under a similar

systems if the internally wired buildings were connected by some types of radio facilities (*e.g.*, infrared) but not others (MDS or satellites).

[31] The House Report's understanding that SMATV systems would not be cable systems "unless such . . . facilities use a public right-of-way" is consistent with these principles, since cable's use of rights-of-way only occurs when cable is used outside a building's premises. H.R. Rep. No. 98-834, 98th Cong., 2d Sess. 44 (1984).

[32] In addition, single-building systems fall squarely within the Cable Act's exemption for private cable systems since they only serve subscribers in a single multiple unit dwelling that is under common control, ownership, or management. The Senate Report on the Senate version of the Act, which contained an identical exemption, stated that it was designed to cover "the so-called private cable systems, or master antenna television (MATV) or satellite master antenna television (SMATV) system." S. Rep. No. 98-67, 98th Cong., 1st Sess. 18-19 (1983). The clear distinction between MATV/SMATV systems and cable systems also is reinforced by the separate reference to SMATV systems as distinct from cable systems in the

analysis, MATV or SMATV buildings interconnected by radio facilities alone also will not be deemed to be "cable systems." By contrast, MATV or SMATV buildings that are connected by wire, cable, or other closed transmission paths will be considered cable systems, unless they fall into the "private cable" exemption set forth in the Cable Act. The scope of that exemption is discussed below.

B. PRIVATE CABLE EXCLUSION

23. Section 602(6) of the Cable Act and Section 76.5 (a) of our rules exclude from the definition of a cable system "a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities use any public right-of-way." Where SMATV and MATV buildings [33] are interconnected by closed transmission paths. Commission precedent and the plain language of the statutory exemption make clear that the services must be considered cable systems unless (1) the buildings are commonly owned, controlled, or managed and (2) the facilities do not use any public rights-of-way.

24. *"Common Ownership, Control, or Management Requirement.* When incorporating the statutory exemption for private cable systems into our rules, we suggested that we would rely solely on whether the facility crossed a public right-of-way.[34] In the *Fargo* decision,

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equal employment opportunity provisions of the Act. See Section 634(h)(1) ("For purposes of this section, the term 'cable operator' includes any operator of any satellite master antenna television system . . . .").

[33] Whether a SMATV or MATV building serves a "multiple unit dwelling" for purposes of the private cable exemption has been fully discussed in prior Commission decisions. *See First Report and Order in Docket 00561*, 63 FCC 2d 956 (1977) and cases cited therein.

[34] Thus, we initially stated that "[w]ith regard to the exclusion of facilities serving multiple unit dwellings, we will include as cable

however, the district court expressly rejected this conclusion, claiming that "it contravenes unambiguous Congressional intent." [35] In the *Notice*, we stated our inclination "to concur in the court's view that the exception is not available unless the multiple unit dwellings served by a video programming delivery system are commonly owned, controlled or managed *and* there is no crossing of a public right-of-way involved." [36]

25. Most commenters concurred with this view. Those who did not [37] interpreted the Act's legislative history to support their argument that Congress intended the use as a public right-of-way to be key to inclusion or exclusion from the definition. In this regard, the House Report on the Cable Act states that the definition exempts "a facility or combination of facilities that serves only subscribers of one or more multiple unit dwelling (in other words, satellite master antenna television system), *unless such facility or facilities use a public right-of-way.*" [38]

26. Notwithstanding the above cited language, we believe that our inclination, as stated in the *Notice*, was correct. Indeed, a contrary interpretation would appear

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systems only such facilities that use public rights-of-way." *Cable Communications Act Rules*, 50 Fed. Reg. 18637, 58 RR 2d 1, 11 (1985). On reconsideration, we further stated that "[w]hen multiple unit dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not ownership, control or management." *Cable Communications Act Rules (Reconsideration)*, 104 FCC 2d at 396-97 (1986).

[35] *City of Fargo v. Prime Time Entertainment, Inc., slip op.* at 9.

[36] 4 FCC Rcd at 2088.

[37] These included Spectradyne, National Satellite Programming Networks et al., American Tele/Lease. PrimeTime 24. Pellegrin & Levine, Pacific West Cable, and Preferred Communications.

[38] H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 44 (1984) (emphasis added).

to render the "common ownership, control, or management" portion of the statutory definition superfluous, a violation of the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." [39] Because the plain language of the statute is unambiguous, resort to legislative history is unnecessary.[40] In any event, the "common ownership, control, or management" aspect of the exception has been a part of our definition of a cable system from the beginning [41] and we do not now believe the language added by the Cable Act pertaining to public right-of-way use was intended to expand the types of facilities exempted from coverage of the Act. We conclude, therefore, that in some circumstances where multiple unit dwellings are involved—specifically where cable is used to interconnect individual buildings, the ownership, control, and management of the building is relevant to determining where the system is a cable system.[42]

27. *Public Right-of-Way Use.* In order to qualify for the private cable exemption, a facility not only must serve buildings that are commonly owned, controlled, or

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[39] Kungys v. U.S., 108 S. Ct. 1537, 1550 (1988) (opinion of Scalia, J.).

[40] *See ACLU v. FCC*, 823 F. 2d 1534, 1568-1569 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988).

[41] *First Report and Order in Docket* Nos. 14895 and 14233, 38 FCC 683 (1965).

[42] This interpretation is also consistent with the Commission's preemption decisions prior to the Cable Act, in which the Commission made clear that state regulation of facilities defined by the Commission as cable systems had not been preempted. For this reason and the reasons stated above, we reject PrimeTime 24's proposal that we interpret the SMATV exception to exclude from the cable system defintion any video distribution service operating exclusively on private property. *See also Massachusetts Community Antenna Television Commission*, 2 FCC Rcd 7321 (1987).

managed but also must not use any public right-of-way. We therefore sought comment in the *Notice* "with respect to the question of what constitutes a crossing of a public right-of-way, including but not limited to the use of infrared technology." [43] As noted by several parties, the specific statutory language refers to "uses" of a public right-of-way and our use of the term "crossing" was not meant to imply anything different.

28. As discussed above, radio transmissions, including infrared transmissions, do not constitute "closed transmission paths" under the statutory definition of a cable system. Accordingly, such transmissions do not meet even the threshold definitional requirements of a cable facility. In addition, most parties commenting on this issue stated their belief that Congress did not intend to include within the meaning of the term "use" of a public right-of-way the mere passing over of such a right-of-way by electromagnetic radiation. We agree. As articulated by Southwestern Bell Corporation and others, radio waves may cross a public right-of-way but do not use it. We believe it is well established that radio transmissions, including line of sight transmissions, such as the point-to-multipoint transmission used in MDS, do not use public rights-of-way. For example in *New York State Commission on Cable Television v. FCC*, the court stated that "MDS is different from franchised cable in one critical respect: it is operated solely on private property and makes no use of public rights-of-way." [44]

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[43] 4 FCC Rcd at 2088. In light of our conclusion above that infrared, point-to-point microwave, and other radio transmission systems do not constitute "closed transmission paths" we recognize that the consequence of whether such transmissions involve right-of-way use issue is much reduced. Nevertheless, because right-of-way use has constituted an important jurisdictional boundary, *e.g.* Section 621(e) of the Act, we believe the matter continues to warrant discussion.

[44] 749 F.2d 804, 810 (D.C. Cir. 1984). As the Mass Media Bureau explained in *Channel One, Inc.* (letter dated February 25, 1986),

29. This conclusion comports fully with Section 621(e) of the Act, which left unaffected Commission decisions limiting State authority to license or regulate MATV or SMATV type facilities not using any public right-of-way. The House Report states

> Section 621(e) clarifies that this bill does not affect the authority of a state or political subdivision to license or regulate an SMATV system which does not use public right-of-way. Recently the FCC sought to preempt state regulation *Earth Satellite Communications, Inc.* . . . The Committee does not intend anything in this title to affect the FCC's decision, or to affect any view of this decision by the courts.[45]

In both its *Orth-O-Vision*[46] and *Earth Satellite Communications*[47] decisions, the Commission had stated that a central basis for its decision to permit state franchise regulation of cable system was that such systems use of public rights-of-way, whereas preempted, non-cable MATV and SMATV (in which cable is used only within a building's premises) do not.[48] Accordingly, crossing but not "using" a public right-of-way by infrared or radio relay

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the premise that the line-of-sight paths required by infrared and other radio transmission burden and thus use public rights-of-way is "unfounded" because

> [t]he location of the line of sight communications link is selected at the operator's risk, and the community is generally under no obligation to accommodate that selection by forbearing from the installation of potential obstructions that would have been installed irrespective of the communications link.

[45] H.R. Rep. 98-934, 98th Cong., 2d Sess. 63 (1984).

[46] 69 FCC 2d 178 (1980); *recon. denied*, 82 FCC 2d 178 (1980).

[47] 95 FCC 2d 1223 (1983).

[48] *See generally New York State Commission on Cable Television v. FCC*, 749 F.2d at 808-11.

facilities does not change the applicability of the policies reflected in Section 621(e) and in the *Orth-O-Vision* and *Earth Satellite Communications* decisions.

30. Whether a facility uses a right-of-way, of course, remains relevant to whether a multi-building system interconnected by closed transmission paths falls within the private cable exemption. As noted previously, in order to qualify for this exemption, the facility not only must serve multiple unit dwellings that are commonly owned, controlled, or managed, but it also must not use a public right-of-way. If the facility does cross a public right-of-way, it will be considered a cable system for purposes of the Cable Act and our rules.

C. Other Issues Raised by Parties

31. The comments of Spectradyne and the late-filed reply comments of the City of Chicago (which we shall accept in the interest of having a complete record) raise certain issues regarding the status of entities that use common carrier telephone lines to transmit programming to hotels and multiple unit dwellings. These matter are more generally at issue in our pending proceeding relating to telephone-cable cross-ownership,[49] and are not at issue in today's decision.

32. We note, however, that for an operation to be defined as a cable system it must have "subscribers." Although the term "subscriber" is not a defined term in the Cable Act, it is now and was defined at the time of passage of the Cable Act in the Commission's rules as "a member of the general public who receives broadcast programming distributed by a cable television systems and *does not further distribute it.*"[50] Thus, for example, if

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[49] *Notice of Inquiry and Notice of Proposed Rule Making in CC Docket* 87-266, 3 FCC Rcd 5849, 5863-64 (1988).

[50] Section 76.5(ee) (emphasis added).

video service is delivered to hotels for resale by these establishments over internal MATV wiring to lodgers, then that service provider (i.e. the party delivering programming to the hotels) has no "subscribers" as that term is defined in the Commission's rules. Because providing service "to multiple *subscribers* within a community" [47] is a critical element in the statutory definition, such an operation—if it operates as a wholesaler and has no "subscribers" of its own—may not come within the cable system definition. We note, moreover, that hotels are within the exemption for multiple unit dwellings and, as clarified herein, where more than one such multiple unit building is interconnected only by radio transmission or other non-closed transmission facilities (or use closed paths but are commonly owned and have no street crossings), such an entity is not a cable system.[51]

33. The National Cable Television Association suggests in its comments that there are particular cable rules that might well be applied to entities other than cable systems and urges that such matters "can be given a more thorough airing in a discrete proceeding." NCTA and the Community Antenna Television Association also raise an issue concerning signal leakage by non-cable distribution systems, and urge that a separate Rule Making proceeding be undertaken on this question.[52] These matters are beyond the scope of the instant proceeding and will not be addressed here. Should these parties wish to pursue these matters further, they should file a petition for Rule Making in accordance with Section 1.401 of the Commission's Rules.

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[51] Nor are they cable systems if closed transmission paths are used but no right-of-way is involved and the buildings are commonly owned, controlled or managed.

[52] Signal leackage [*sic*] from such operations, it should be noted, is not unregulated. It is, however, covered by Part 15 (radio frequency devices) rather than by Part 76 (cable television) of the rules.

IV. CONCLUSION

34. To resolve significant issues concerning the scope of the statutory term "cable system," we have carefully reviewed in this proceeding the language and legislative history of the Cable Act and the Commission's precedents interpreting the term. As discussed above, we have concluded that facilities must be interconnected by physically closed or shielded transmission paths to meet the statute's threshold requirement for a cable system. Use of radio or infrared transmissions alone does not meet this threshold criterion. The use of wire or cable exclusively within the premises of multiple unit buildings (MATV and SMATV systems) also does not fall within the statutory definition. Thus, use of radio facilities to connect more than one multiple unit dwelling served by a MATV or SMATV system does not make that system a cable system. However, where a wire or cable is used to interconnect MATV or SMATV equipped buildings, the system is a cable facility unless the several buildings are commonly owned, controlled, or managed and the system's physically closed interconnection paths do not use a public right-of-way. Although these general principles may not resolve every possible issue concerning the scope of the statutory definition, they should provide ample guidance in interpretations of the statutory terms and, in our view, will significantly dispel the confusion that has arisen.

Regulatory Flexibility Act Final Analysis

35. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is [as] follows:

Need for and purpose of the rules.

The Cable Communications Policy Act of 1984 defined what a cable system is for purposes of the Act. In response to two district court decisions, we have read-

dressed our implementation and interpretation of the statutory definition to ensure that we carry out the intent of Congress.

Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and the changes made as a result.

A. *Issues raised.* No issues or concerns were raised in response to the initial regulatory flexibility analysis.

B. *Assessment.* Because there were no comments directed to the initial regulatory flexibility analysis, the Commission views the initial analysis as correct and no additional assessment is necessary.

C. *Changes made as a result of such comments.* None

Significant alternatives considered and rejected.

The Commission considered all the alternatives presented in the Notice and considered all the comments directed to the various issues in the *Notice.* After carefully weighing all aspects of this proceeding, the Commission has adopted the interpretation of the term cable system that appears most reasonable under the mandate of the Cable Act.

36. Accordingly, IT IS ORDERED that, pursuant to sections 4(1), 303(r) and 602(6) of the Communications Act, 47 U.S.C. Sections 154(1), 303(r), and 522 (6), the interpretations of the term cable system set forth in this proceeding ARE ADOPTED.

37. IT IS FURTHER ORDERED that the "Motion for leave to file Reply Comments *Nunc Pro Tunc* July 10, 1989" filed August 18, 1989 by the City of Chicago IS GRANTED.

38. IT IS FURTHER ORDERED that the "Motion to Strike" filed August 8, 1989, by the National Satellite Programming Network, *et al.*, IS DENIED.

39. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

List of Commenters

1. American Tele/Lease, Inc.
2. BellSouth Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company
3. Capital Cities/ABC, Inc.
4. Capital Wireless Corporation
5. City of New York
6. Community Antenna Television Association, Inc.
7. George Mason University Foundation, Inc.
8. Hughes Communications Galaxy, Inc.
9. Liberty Cable, Inc.
10. Major League Baseball, National Basketball Association, and National Hockey League.
11. Microband Companies Incorporated
12. National Broadcasting Company, Inc.
13. National Cable Television Association, Inc.
14. National Satellite Programming Network; Beach Communications, Inc.; Casden Cable Company; CMJ Communication; Maxtel Limited Partnership; MGM Satellite Vision, Inc.; Mid-Atlantic Communications, Inc.; Network Multi-Family Security Corp.; Pacific Cablevision; Telecom Satellite System Corp.; Telesat Cablevision, Inc.; 21st Century Technology Group, Inc.; WCTV-Tampa Bay, Inc.; and Western Cable Communications, Inc.
15. National Telephone Cooperative Association.
16. Pacific Bell and Nevada Bell
17. Pellegrin & Levine, Chartered
18. PrimeTime 24, Joint Venture
19. Southwestern Bell Corporation
20. Spectradyne, Inc.
21. Todd Integrated Systems, Inc. and Peoples Choice TV, Inc.

22. WH-TV Broadcasting Corporation d/b/a Telecable of Puerto Rico
23. Wireless Cable Association, Inc.

Reply Comments

1. American Tele/Lease, Inc.
2. Association of Independent Television Stations, Inc.
3. Bell South Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company
4. Capital Wireless Corporation
5. City of Chicago
6. Cross Country Telecommunications, Inc.
7. George Mason University Foundations, Inc.
8. National Cable Television Association, Inc.
9. National Satellite Programming Network; Beach Communication, Inc.; Casden Cable Company; CMJ Communications; Maxtel Limited Partnership; MGM Satellite Vision, Inc.; Mid-Atlantic Communications, Inc.; Network Multi-Family Security Corp.; Pacific Cablevision; Telecom Satellite Systems Corp.; Telesat Cablevision, Inc.; 21st Century Technology Group, Inc.; WCTV-Tampa Bay, Inc.; and Western Cable Communications Inc.
10. Pacific West Cable Company and Preferred Communications, Inc.
11. Pellegrin & Levine, Chartered
12. Todd Integrated Systems, Inc. and People Choice TV, Inc.
13. Wireless Cable Association, Inc.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM Docket No. 89-35

IN THE MATTER OF

DEFINITION OF A CABLE TELEVISION SYSTEM

NOTICE OF PROPOSED RULE MAKING

Adopted: February 1, 1989: Released: March 3, 1989

By the Commission:

1. On October 30, 1984, the Cable Communications Policy Act of 1984 (Cable Act)[1] was signed into law, establishing a national policy concerning cable communications "that clarifies the current system of local, state and Federal regulation of cable television."[2] In order to implement provisions of the Act, we adopted certain amendments to Parts 1, 63, and 76 of the Commission's Rules. *Cable Communications Act Rules*, 58 RR 2d 1 (1985) *modified*, 104 FCC 2d 386 (1986), *aff'd in part and rev'd in part sub nom. ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988). The implementation of one of our conforming rule amendments has given rise to certain questions, which lead us to issue this Notice of Proposed Rule Making.

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[1] Pub. L. No. 98-549, Section 1 *et seq.*, 98 Stat. 2779 (1984) (codified principally at 47 U.S.C. Sections 521-639). The Cable Act amends the Communications Act of 1934, as amended, 47 U.S.C. Section 151, by adding, *inter alia*, a new Title VI.

[2] H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 19 (1984).

2. The Cable Act defines a cable system as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes basic programming and which is provided to multiple signals within a community." 47 U.S.C. Section 522.51. That same section also excludes from the definition of a cable system "a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way. 47 U.S.C. Section 552(6)(B). In adopting our implementing rule we adopted the Act's definition and exclusions including the one noted above, as a conforming rule change. *Cable Communications Act Rules, supra. See also* 47 C.F.R. Section 65(a). In doing so, we stated that "with regard to the exclusion of facilities serving multiple unit dwellings, we will include as cable systems only such facilities that use public rights-of-way." *Cable Communications Act Rules*, 58 RR 2d at 11. On reconsideration, we further stated that "[w]hen mutiple unit dwellings are involved, the distinction between a cable system and other forms of video distribution systems is upon the crossing of the public rights-of-way, not the ownership, control or management." *Cable Communications Act Rules (Reconsideration)*, 104 FCC 2d at 396-397. Recent decisions by two federal district courts, however, have raised significant questions concerning both the Commission's construction of the multiple unit dwelling exception to the cable definition and the application and scope of the basic definition itself.[3]

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[3] While the decisions of the district courts do not settle questions of national communications policy. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468-69 and n.5 (1984), the potential adverse effect of disparate opinions of the district courts on fundamental definitional questions such as those at issue in these cases is significant. Indeed, it was for this reason that the Commission expressly requested referral on primary jurisdiction grounds in

3. Specifically, in *City of Fargo v. Prime Time Entertainment, Inc.*, No. A3-87-47 slip op. (D.N.D. Mar. 28, 1988), the district court found that the delivery by infrared transmissions of video programming to multiple unit dwellings that were not commonly owned, controlled or managed rendered the facilities involved a cable television system within the meaning of Section 522(6) of the Communications Act of 1934, as amended. Because cable systems are required by the Act to obtain a franchise from local authorities and the service provider in this case. Prime Time Entertainment, Inc. (Prime), had not done so, the court concluded that Prime's operations were impermissible. Accordingly, the court enjoined Prime from providing service over its existing facilities until the requisite franchise was obtained. In its decision, the court specifically addressed the applicability to Prime of the multiple unit dwelling exception to the cable definition. It found the exception to be unavailing in the circumstances of the case before it because the units served by Prime were not commonly owned, controlled or managed.[4] In reaching this determination, the court expressly rejected the Commission's interpretation of the Section 522(6)(B) exception, noted above. The court concluded that the Commission's disregard of the

City of Fargo v. Prime Time Entertainment, Inc., No. A3-87-47 slip op. (D.N.D. Mar. 28, 1984) discussed below. The district court, however, denied our request. Accordingly, to avoid these potential adverse effects and to provide certainty and uniformity in this area, we believe this Rule Making proceeding is advisable.

[4] As a result, the court did not reach the question of whether the interconnection of multiple unit dwellings by infrared transmissions constituted a crossing of a public right-of-way. We note, however, that the Mass Media Bureau, in informal opinions issued pursuant to delegated authority, has expressed the rules that the linkage of two SMATV systems by infrared transmissions does not constitute a crossing of a public right-of-way. *See Channel One, Inc.* (letter dated February 25, 1986) and Letter to Mark J. Tauber and Deborah C. Costlow (dated December 19, 1985).

common ownership, control or management aspect of the exception and its exclusive reliance on the crossing of a public right-of-way as dispositive of the exception's applicability was erroneous "because it contravenes unambiguous Congressional intent." [5]

4. Two basic aspects of the *Fargo* decision invite particular attention. First, the court's rejection of our construction of the multiple unit dwelling exception suggests a clear need to revisit this area. After a preliminary review, we are inclined to concur in the court's view that the exception is not available unless the multiple unit dwellings served by a video programming delivery system are commonly owned, controlled or managed *and* there is no crossing of a public right-of-way involved. Commenters are welcome to propose alternative constructions of the statutory exception, but in doing so they should carefully document their supporting arguments. Comments are also sought specifically with respect to the question of what constitutes a crossing of a public right-of-way, including but not limited to the use of infrared technology.

5. Second, the possible implication in the *Fargo* court's decision that Prime's wireless, infrared transmission system might satisfy the basic statutory definition of a cable system as a "set of closed transmission paths and associated signal generation, reception and control equipment was designed to provide cable service" has potentially troubling implications. We are especially concerned that the potential inclusion within the cable definition of a nontraditional delivery system such as infrared extends the definition in a manner that may be inappropriate and inconsistent with congressional intent. This could presage other possibly inapt extensions of the definition that would require the treatment of additional wireless video delivery systems as cable systems as well. Indeed,

[5] *City of Fargo v. Prime Time Entertainment, Inc.*, slip op. at 9.

in a very recent decision, another federal district court apparently concluded that the interception of local television broadcast signals and their national retransmission via space satellite to individual home satellite-receive facilities constituted a cable television system within the meaning of the Communications Act. *Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc.*, 694 F. Supp. 1565 (N.D.Ga. 1988).[6] For purposes of the cable system definition, the service provided by Satellite Broadcast Networks, Inc. (SBN), in that case is difficult to distinguish from the service proposed to be provided by Direct Broadcast Satellite (DBS) systems. DBS, like other analogous services, including the Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS), is designed to deliver video programming to multiple subscribers in a community. Yet, it seems clear that Congress did not intend in adopting the Cable Act to include these alternate delivery systems within the statutory definition of a cable system. Several considerations prompt our view in this regard.

6. First, nowhere in the Cable Act or in its legislative history is there an affirmative statement that Congress

[6] The court reached this determination in the context of finding that, under the provisions of the Copyright Act of 1976, 17 U.S.C. Section 101, *et seq.*, *Satellite Broadcasting Networks, Inc.* (SBN), was not entitled to a compulsory license to distribute the broadcast signals it was delivering to homes by satellite. The court detailed two rationales for its finding. First, the court concluded that SBN was ineligible for a compulsory license because only cable systems were entitled to the license and SBN's facilities did *not* meet the definition of a cable system in the Copyright Act. Second, the court noted that, under the Copyright Act, a compulsory license is only available with respect to signals the carriage of which is permissible under the rules of the FCC. The court found that SBN's service did not meet this criterion because SBN *did* constitute a cable system under the definition in the Communications Act and it had not obtained certain service authorizations required of cable systems.

meant to define a cable system so broadly as to incorporate such services as MDS, MMDS, DBS or Satellite Master Antenna Television (SMATV). This omission is significant since such a broad definition of a cable system represents a dramatic departure from longstanding and consistent Commission practice in regulating cable television service. Ordinarily, such a radical change would be expected to prompt specific congressional comment, particularly since Congress was plainly aware of the discrete nature of the alternative video service involved when it adopted the statutory definition and appeared to anticipate their being subject to a different form of regulation than cable.[7] Second, the statutory scheme adopted in the Cable Act is, in many fundamental respects, entirely inappropriate for such alternative services as MDS and DBS Local franchising requirements, for example, are completely incompatible with the national service characteristics of a DBS system.[8] Finally,

[7] Until 1977, the Commission expressly defined a cable system as a facility that delivered service by "wire or cable," thereby limiting the defintion to traditional cable systems and excluding wireless technologies. *See Cable Television Report and Order and Consideration*, 36 FCC 2d 1, 74 (1972) (former Section 76.5(a) of the rules adopted therein). In 1977, the Commission revised the definition by substituting the term "a set of transmission paths" for "wire or cable." In doing so, however, the Commission specifically noted its intent that the new defintion "not be interpreted to include such non-cable television broadcast station services as Multipoint Distribution Systems . . . ." *First Report and Order* in Docket No. 20561, 63 FCC 2d 956, 966 (1977). This definition remained in effect, without relevant change, until adoption of the Cable Act in 1984.

[8] For example in reviewing recent developments in the home video industry the Report of the House Committee on Energy and Commerce accompanying H.R. 4103 (the House version of the Cable Act) noted that "[n]ew forms of competition to cable were initiated or began to show promise of emerging during this period. These include the SMATV industry, multi-channel MDS Direct Broadcast Satellite

we believe the language of the definition itself—particularly the requirement that a cable system consist of a "set of closed transmission paths"—contemplates excluding delivery systems that exclusively or primarily utilize "radiating" technology to deliver service to end users.

7. In view of the foregoing analysis we seek comment concerning the proper scope and application of the cable system definition contained in Section 522(6) of the Act and whether, and in what manner, we should amend our rules or existing interpretations of our rules to properly reflect the statutory definition. We are particularly concerned that delivery systems apparently not intended to be included within the definition—such as SMATV, DBS, MDS, MMDS and leased uses of Instructional Television Fixed Service (ITFS) channels—not fall within the ambit of any interpretation or definition we may eventually adopt. In this connection, we specifically request that commenters address whether existing language in the definition—for example, the requirement that a cable system be comprised of a "set of closed transmission paths"—adequately distinguishes traditional cable systems from alternative video delivery services.

(DBS), subscription television, and the expansion in home video cassette recorders." H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984) at 22. Indeed, the House Report directly reflects Congressional awareness of the regulators distinctiveness of cable in expressing its concern for competitive insurance among the different video delivery systems. In this connector, the House Report stated

> In adopting this legislation, the Committee is concerned that federal law not provide the cable industry with an unfair competitive advantage in the delivery of video programming. National communications policy has promoted the growth and development of alternative delivery systems for there services, such as DBS, SMATV and subscription television. The public interest is served by this competition and it should continue.

Id. at 22, 23.

REGULATORY FLEXIBILITY ACT
INITIAL ANALYSIS

8. *Reason for action.* This action is taken to implement certain provisions of the Cable Communications Policy Act of 1984.

9. *Legal basis.* Authority for action as proposed for this Rule Making is contained in Section 4(i) and Section 303 of the Communications Act of 1934, as amended.

10. *Description, potential impact and number of small entities affected.* The Commission seeks comment in this proceeding on two basic issues related to the definition of a cable television system in the Communications Act. First, noting the decision in *City of Fargo v. Prime Time Entertainment, Inc.*, No. A3-87-47 (D.N.D. Mar. 28, 1988), in which the district court found the Commission's broad construction of the multiple unit dwelling exception to the cable definition to be erroneous, the Commission invites comment on the appropriate interpretation of the exception. In this regard, the Commission expressed its preliminary concurrence in the court's opinion. Under the court's view of the exception, a facility otherwise qualified as a cable system under the basic definition would be excluded from the definition only if it both (a) exclusively serves multiple unit dwellings under common ownership, management or control and (b) the facility does not cross any public right-of-way. If this view is ultimatey adopted by the Commission, some small entities might be considered cable television systems that were previously deemed exempt. This reclassification could result in substantial burdens for the affected entities, including a requirement that a franchise be obtained and adherence to Commission rule and statutory requirements for cable systems. Second, the Commission notes its concern that the *Fargo* decision could be read to imply that a video delivery system that used primarily a technology other than wire or cable in providing its services could nonetheless be a cable system

under the Communications Act. The Commission questions whether such a broad interpretation of the definition—and that of a second district court which found the direct-to-home delivery of broadcast signals via satellite to constitute a cable system—are consistent with the statutory language in the Act and congressional intent underlying that language. Accordingly, the Commission invites comment on the appropriate scope and application of the basic cable definition. Adoption of the broad view of the definition could result in certain entities not now deemed to be cable systems, including DBS, MDS, MMDS and SMATV systems, being considered cable systems. As already noted in connection with the scope of the exception to the definition, this would result in the application of various regulatory and statutory requirements to these systems, and the imposition of corresponding burdens, which have not been heretofore applied.

11. *Recording, record keeping and other compliance requirements.* None.

12. *Federal rules which overlap, duplicate or conflict with this rule.* None.

11. *Any significant alternatives minimizing impact on small entities and consistent with stated objectives by the Act.* None.

PAPERWORK REDUCTION ACT IMPLICATIONS

14. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified requirements or burdens upon the public.

PROCEDURAL MATTERS

15. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See Generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding Section 1.1203.

16. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates Section 1.1206.

17. Pursuant to procedures set out in Section 1.415 of the Commission's Rules, interested parties may file com-

ments on or before May 2, 1989 and reply comments on or before June 1, 1989. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

18. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth above. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the *Notice*, including the initail regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 50 U.S.C. Section 601 *et seq.* (1981)).

19. In accordance with the provision of Section 1.419 of the Commission's Rules and Regulations, an original and 5 copies of all comments, replies, or other documents filed in this proceeding shall be furnished to the Commission. Participants filing the required copies who also wish each Commissioner to have a personal copy of the comments may file an additional 6 copies. Members of the general public who wish to express their interest by participating informally in the Rule Making proceeding may do so by submitting one copy of the comments, without regard to form, provided only that the Docket Number is specified in the heading. Responses will be available for public inspection during regular business hours in the Commission Dockets Reference Room (Room 239) at its headquarter in Washington, D.C. (1919 M Street, N.W.).

20. For further information concerning this proceeding, contact Barrett L. Brick, Cable Television Branch, Mass Media Bureau (202) 632-7480.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[9] We also note that the dual federal-local jurisdictional approach to regulating cable television service—a central component of the statutory scheme—is largely premised on the fact that cable systems necessarily involve extensive physical facilities and substantial construction and use of public rights of way in the communities they serve. Yet these distinctive traits are absent in the alternative delivery systems.

SUPREME COURT OF THE UNITED STATES

No. 92-603

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, PETITIONERS

v.

BEACH COMMUNICATIONS, INC., ET AL.

ORDER ALLOWING CERTIORARI. Filed November 30, 1992.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

November 30, 1992

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No. 92-603

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

BEACH COMMUNICATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The Cable Communications Policy Act of 1984 exempts from coverage facilities that serve "only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities use[] any public right-of-way." 47 U.S.C. 522(6) (1988). The question presented is whether the resulting regulatory distinction between facilities serving separately rather than commonly owned, controlled, or managed buildings is rationally related to a legitimate government purpose under the Due Process Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioners, respondents below, are the United States and the Federal Communications Commission. Respondents, petitioners below, are Beach Communications, Inc., Maxtel Limited Partnership, Pacific Cablevision, and Western Cable Communications, Inc. Respondents, intervenors below, are Spectradyne, Inc., National Cable Television Association, Inc., Wireless Cable Association, Inc., Southwestern Bell Corporation, and Hughes Communications Galaxy, Inc.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-603

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

BEACH COMMUNICATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 965 F.2d 1103. A previous opinion of the court of appeals in this case (Pet. App. 8a-45a) is reported at 959 F.2d 975.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1992. On September 1, 1992, the Chief Justice extended the time for filing a petition to and including October 7, 1992. The petition for a writ of certiorari was filed on October 7, 1992, and was granted on November 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any person * * * be deprived of life, liberty, or property, without due process of law * * *.

Section 602(6) of the Communications Act of 1934, as amended, 47 U.S.C. 522(6) (1988),[1] provides:

> [T]he term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include * * * (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way * * * [.]

STATEMENT

A traditional cable system "receives signals at a remote location and transmits them throughout a community via a network of wires that use local rights-of-way." Pet. App. 11a; see *New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804, 806 (D.C. Cir. 1984). A Satellite Master Antenna Television (SMATV) system, in contrast, is typically a smaller system that receives signals via satellite and retransmits them by wire from a satellite antenna atop a multiple-unit building to units within the building or building complex. See Pet. App. 11a; see also *In re Definition of a Cable Television Sys.*, 5 F.C.C. Rcd. 7638, 7639 (1990) (describing SMATV systems); J.A. 12.

This case involves a challenge by SMATV companies to Congress's imposition of a franchising requirement upon cable facilities that physically interconnect separately owned, controlled, and managed buildings without using public rights-of-way. Under the plain language of 47 U.S.C. 522(6) (1988), such facilities are "cable systems" subject to the franchising requirements of 47 U.S.C. 541(b)(1) (1988). Similar facilities that serve commonly owned, controlled, or managed buildings, however, are entitled to the so-called "private cable" exemption under Section 522(6)(B). The question presented in this case is whether the statutory distinction between common and separate ownership, control, and management is supported by a rational basis under the equal protection component of the Due Process Clause of the Fifth Amendment.

1. a. The Cable Communications Policy Act of 1984 (Cable Act), Pub. L. No. 98-549, 98 Stat. 2779, was enacted, *inter alia*, to establish "a national policy" for cable communications and to provide for "franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs

[1] Since the decision of the court of appeals in this case, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, which, *inter alia*, renumbered subsection (6) of 47 U.S.C. 522 as subsection (7). For convenience, we refer to the version of the statute in effect when the court of appeals issued its decision in this case.

and interests of the local community." 47 U.S.C. 521 (1) and (2) (1988). To effectuate the purposes of the Act, Congress provided that "a cable operator" may not supply "cable service without a franchise." 47 U.S.C. 541(b)(1) (1988).[2] A "cable operator" is a person who provides service through "a cable system" (47 U.S.C. 522(4) (1988)), which is defined as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. 522(6) (1988). The definition of "cable system," however, contains a "private cable" exemption for any "facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities use[] any public right-of-way." 47 U.S.C. 522(6)(B) (1988).

b. This action arises out of a Federal Communications Commission proceeding interpreting the term "cable system" as applied to SMATV facilities. The Cable Act's definition of "cable system" is substantially similar to the FCC's pre-Cable Act[3] regulatory

[2] The franchising requirement of 47 U.S.C. 541(b) (1988) provides an exception for cable operators "lawfully providing cable service without a franchise on June 1, 1984." 47 U.S.C. 541(b)(2) (1988). The recent legislation amended 47 U.S.C. 541(b) to provide a second exception for municipal authorities that are, or are affiliated with, franchise authorities and that act as multichannel video programming distributors. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 7, 106 Stat. 1483-1484.

[3] Prior to 1984, the Commission had since 1965 regulated cable communications pursuant to authority under the Communications Act of 1934. See *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 697 (1965); see also *Malrite T.V.* v. *FCC*, 652 F.2d 1140, 1143-1147 (2d Cir. 1981) (describing subsequent developments in cable regulation), cert. denied, 454 U.S. 1143 (1982). In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), the Court sustained the Commission's authority to promulgate cable regulations "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting."

definition of "cable television system." Compare 47 U.S.C. 522(6) (1988) with 47 C.F.R. 76.5(a) (1984).[4] Of relevance here, the Act incorporated the regulatory "private cable" exemption, but added the proviso denying exemption to facilities that "use[] any public right-of-way." 47 U.S.C. 522(6)(B)

[4] When the Cable Act was enacted in 1984, the pertinent Commission regulation defined "cable television system" as follows:

> A nonbroadcast facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment, under common ownership and control, that distributes or is designed to distribute to subscribers the signals of one or more television broadcast stations, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control, or management.

47 C.F.R. 76.5(a) (1984). The so-called "private cable" exemption in Section 76.5(a)(2) traces back to the Commission's first set of cable rules in 1965. See *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. at 741 (exempting "any * * * facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house").

(1988).[5] In light of that new proviso, the Commission at first interpreted Section 522(6)(B) to mean that "[w]hen multiple unit dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now the crossing of the public rights-of-way, not * * * ownership, control or management." *In re Amendments of Parts 1, 63, & 76*, 104 F.C.C.2d 386, 396-397 (1986); see *Report & Order in MM Docket No. 84-1296*, 58 Rad. Reg. 2d (P & F) 1, 11 (1985) ("With regard to the exclusion of facilities serving multiple unit dwellings, we will include as cable systems only such facilities that use public rights-of-way.").

Subsequently, however, the Commission issued the report and order at issue here, which revised and clarified its interpretation of the term "cable system" under the Act. See *In re Definition of a Cable Television Sys.*, 5 F.C.C. Rcd. 7638 (1990); J.A. 5-31. First, observing that Section 522(6) requires the use of "closed transmission paths," the FCC found that the term "cable system" does not include any facility that uses nonphysical transmission media (such as radio waves) to send signals to multiple-unit

[5] The 1984 Cable Act also changed the definition of cable system in several respects not material to the question under review. For example, the former regulatory definition of a cable television system referred to the distribution of "the signals of one or more television broadcast stations" (47 C.F.R. 76.5(a) (1984)), whereas the Cable Act refers to the provision of "cable service which includes video programming" (47 U.S.C. 522(6) (1988)). See *Report & Order in MM Docket No. 84-1296*, 58 Rad. Reg. 2d (P & F) 1, 9 (1985). The statute also eiminated the regulatory exemption for cable systems with 50 or fewer subscribers. *Ibid.*

buildings. 5 F.C.C. Rcd. at 7638-7639; J.A. 8-11.[6] Second, the Commission determined that facilities serving only a single multiple-unit building by wire are not "cable systems." 5 F.C.C. Rcd. at 7640-7641; J.A. 13-20.[7] Third, reversing its prior order interpreting the Act's "private cable" exemption, the Commission concluded that the exemption is available for physically interconnected multiple-unit buildings only if the buildings satisfy the "common ownership"[8]

[6] Facilities using nonphysical transmission media include multipoint distribution systems (MDS), which beam microwaves to building antennae and then distribute them by wire from each antenna to units within a particular building. *New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d at 806. Direct broadcast satellites (DBS) transmit signals from powerful satellites directly to receivers on individual homes. *Ibid.* The Commission concluded that MDS and DBS services do not meet the Cable Act's definition of "cable system." See 5 F.C.C. Rcd. at 7638-7639; J.A. 8-11. That determination, in the Commission's view, was buttressed by its pre-Cable Act treatment of such services as being outside the definition of a cable system. 5 F.C.C. Rcd. at 7839; J.A. 10-11.

[7] Noting the "virtually identical" (5 F.C.C. Rcd. at 7640; J.A. 13) wording of 47 U.S.C. 522(6) and the pre-Cable Act rule, the Commission rested its determination on its own pre-Cable Act precedents establishing that "the use of wire or cable within the confines of a multi-unit building is not sufficient to bring the service within the jurisdictional bounds of a 'cable' system." 5 F.C.C. Rcd. at 7640; J.A. 15.

[8] For purposes of simplicity, we refer to the requirement of "common ownership, control, or management" as the "common ownership" requirement. We also use the terms "commonly owned" or "separately owned" to refer to ownership, control, and management.

requirement. 5 F.C.C. Rcd. at 7641-7642; J.A. 20-25.[9]

Thus, as the FCC interprets the statute, a SMATV operator who does not use public rights-of-way is subject to the Act if he connects separately owned multiple-unit dwellings by physical means, but not if he connects commonly owned multiple-unit dwellings by physical means. In addition, an otherwise covered SMATV operator who uses nonphysical means to transmit service is not covered, while one who uses physical means is.

2. a. Respondents [10] challenged the FCC's interpretation of the Cable Act on statutory and constitutional grounds. The court of appeals first rejected respondents' contention that the Cable Act does not cover SMATV facilities that physically connect separately owned, controlled, and managed buildings without crossing public rights-of-way. The court reasoned that, under the plain language of 47 U.S.C. 522(6) (1988), such facilities satisfy all of the criteria for coverage.[11] The court also found the facilities inel-

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[9] In that regard, the Commission noted that a contrary interpretation would not only "render the 'common ownership, control, or management' portion of the statutory definition superfluous," but also eliminate an "aspect of the ['private cable'] exception [that] has been a part of our definition of a cable system from the beginning." 5 F.C.C. Rcd. at 7641; J.A. 21-22.

[10] We use the term "respondents" to refer to respondents Beach Communications, Inc., Maxtel Limited Partnership, Pacific Cablevision, and Western Cable Communications, Inc.

[11] Respondents conceded that their facilities use "closed transmission paths" and associated equipment, and that they supply "video programming." Pet. App. 20a. The court was unpersuaded by their contention that SMATV facilities do not serve "multiple subscribers within a community" (47 U.S.C. 522(6) (1988)) because service is limited to a particular group of buildings within a community. Pet. App. 20a.

ligible for the "private cable" exemption under Section 522 (6) (B), which in plain terms requires "common ownership, control, or management" of the buildings served. Pet. App. 20a-21a.

The court, however, found merit in respondents' claim that Section 522(6) violates the Fifth Amendment because there is no rational basis for imposing franchise requirements upon the covered SMATV facilities, while exempting (a) SMATV facilities that satisfy the "common ownership" requirement and use no public rights-of-way, and (b) distribution systems using nonphysical media to transmit signals to multiple-unit dwellings.[12] The court agreed with

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[12] Respondents also claimed that applying a franchising requirement to their cable operations violated the First Amendment. The court, however, found that claim unripe. Pet. App. 25a-31a. The court acknowledged that 47 U.S.C. 541(b)(1) (1988) imposed a franchising requirement upon the SMATV operators, but noted that the Cable Act gave localities "broad discretion to determine the substance and process of franchising"—including the authority to adopt "a summary process." Pet. App. 25a-27a. Because of the local discretion over particular franchising duties, and "because the justification for [those] dut[ies] [would] depend on local facts," the court concluded that a pre-enforcement, facial attack upon Section 522(6) under the First Amendment was unfit for present judicial determination. Pet. App. 27a. Finally, because it was unclear whether particular franchising systems would impose any substantial compliance costs, and because respondents could file anticipatory as-applied challenges, the court concluded that the availability of criminal and civil penalties for noncompliance with the

respondents that no rational basis was evident "[o]n the record before [it]." Pet. App. 34a. Finding that the traditional rationale for cable franchising—the use of public rights-of-way—did not apply to the pertinent types of facilities, the court was unable to discern any alternative ground for distinction in the legislative record or "to imagine *any* basis" itself. *Id.* at 34a-35a. The court remanded the case to the FCC to create an administrative record of "legislative facts" suggesting a "conceivable basis" for the distinction. *Id.* at 36a.[13]

b. Chief Judge Mikva concurred in part and concurred in the judgment, but did not join the court's equal protection analysis. Pet. App. 36a-45a. Observ-

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Act did not amount to hardship requiring immediate judicial review. Pet. App. 30a-31a.

We note that the Cable Television Consumer Protection and Competition Act of 1992 has now substantially revised the obligations imposed upon cable systems under the Communications Act. For example, the new statute includes more detailed provisions concerning cable rate regulation (§ 3, 106 Stat. 1464-1471) and adds new signal carriage requirements (§§ 4-5, 106 Stat. 1471-1481). The new regulatory provisions, however, are not before this Court. In addition, the 1992 legislation does not affect the definition of "cable system" or, accordingly, the question whether there is a rational basis for distinguishing between facilities serving commonly and separately owned multiple-unit buildings.

[13] Respondents also contended that the court should apply heightened scrutiny under the equal protection component of the Due Process Clause, because the classification at issue infringed fundamental First Amendment rights. Pet. App. 31a. The court noted that if the Commission provided a rational basis for the classification, the court would have to decide whether a "fundamental rights" equal protection claim was ripe. *Id.* at 32a.

ing that the Cable Act bears a "very strong presumption of constitutionality" that may be sustained "by justifications in or out of the record," he found the challenged distinctions "entirely reasonable in light of the * * * Act's purposes." *Id.* at 40a-41a. With respect to the Act's distinction between facilities interconnecting buildings by wire, rather than nonphysical transmission media, Chief Judge Mikva suggested that the classification serves Congress's objective of promoting new technologies, by "creat[ing] an incentive for SMATV operators to switch from physical wiring to radio transmission so that they are exempt from regulation." *Id.* at 42a. As for the "common ownership" requirement in 47 U.S.C. 522(6)(B) (1988), the concurrence noted that Congress could have reasoned that a SMATV system "serving multiple buildings not under common ownership is similar to a traditional cable system," but that one "serving buildings under common ownership is likely to be smaller, and the ability of residents to influence ownership [is] likely to be greater." Pet. App. 43a. Chief Judge Mikva, however, concurred in the remand to allow the FCC "to put the classifications in context." *Id.* at 44a.

3. a. The FCC's report to the court of appeals endorsed the reasoning of the concurrence without offering additional supporting facts. See Pet. App. 50a. After receiving the report, a divided court of appeals held the Cable Act unconstitutional, finding no rational basis for the "common ownership" requirement. *Id.* at 3a-4a.[14] While acknowledging that Chief

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[14] Although it had adverted to the issue in its initial decision, the majority did not address whether there was a

Judge Mikva had suggested justifications for the requirement in his prior opinion, the court reasoned that it had "no basis for assuming" the state of facts that he had posited and found it dispositive that "the FCC has wholly failed to flesh th[ose] [justifications] out, or to suggest some alternative rationale." *Id.* at 4a. The court accordingly held that SMATV systems serving customers in buildings under separate ownership, control, and management, were to be exempted from the Act's franchise requirements if they did not use public rights-of-way. *Id.* at 5a-6a.

b. Chief Judge Mikva dissented for the reasons advanced in his prior concurring opinion. Pet. App. 7a.

SUMMARY OF ARGUMENT

A divided panel of the court of appeals invalidated an Act of Congress regulating cable communications on the ground that the Act's classification of cable facilities lacks any conceivable rational basis. The court thereby repudiated Congress's judgment that the rationale for regulating cable facilities is likely to be absent when a cable facility only serves multiple-unit dwellings under common ownership, control, or management. In so doing, the majority ignored the plausible assumption (see Pet. App. 43a (separate opinion of Mikva, C.J.)) that the "common ownership" requirement serves the interest of consumer welfare by placing a relative constraint on the size of a cable facility's subscriber base, and that it is a rational rule-of-thumb for determining when the cost of regulating facilities outweighs the benefits of doing

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rational basis for distinguishing facilities using physical transmission media from those using nonphysical media, such as radio waves. Pet. App. 3a.

so. The court also disregarded Commission precedent, which had embraced a "private cable" exemption, and the accompanying "common ownership" requirement, from the inception of the FCC's regulation of cable. See, *e.g.*, *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 741 (1965).

The court's rejection of Congress's policy judgment, and of the plausible assumptions supporting it, was premised on basic errors in the application of rationality review under the equal protection component of Due Process Clause of the Fifth Amendment. The court remanded the case to the Commission because the majority could not conceive of a rational basis "[o]n the record before [it]." Pet. App. 34a. The majority also refused to credit plausible assumptions suggested by Chief Judge Mikva and endorsed by the FCC, because the majority had "no basis for assuming" them and because the Commission, on remand, had failed to "flesh the[m] out." *Id.* at 4a.

Accordingly, the majority effectively held that a factual basis for a classification in an Act of Congress must appear on a legislative or administrative record. That is contrary to settled principles of rational-basis review, see, *e.g.*, *Sullivan* v. *Stroop*, 496 U.S. 478 (1990); *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166 (1980); *Vance* v. *Bradley*, 440 U.S. 93 (1979). The court of appeals' decision conflicts with a number of decisions of this Court that apply the rational-basis test by indulging plausible, but unverified, assumptions that are without evidentiary support in the record. See, *e.g.*, *United States R.R. Retirement Bd.* v. *Fritz*, *supra*; *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955); *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106 (1949).

The court of appeals' failure to adhere to this Court's precedents caused it to invalidate a complex, thoroughly considered piece of socio-economic legislation, even though the suggested justifications fall well within the reach of "rough accommodations" (*Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970)) that the democratic process is entitled to make under the rational-basis test. Although Congress could assuredly have chosen a more precise method of exempting smaller facilities from regulation, the classification here is not unconstitutional merely because it is "imperfect" or is not drawn with "mathematical nicety." *Ibid.*; see *City of Dallas* v. *Stanglin*, 490 U.S. 19, 27 (1989). In fact, the "common ownership" requirement is not so overinclusive and underinclusive that it bears no rational relationship to "any combination of legitimate purposes"; hence, it easily passes muster under equal protection principles. See *Vance* v. *Bradley*, 440 U.S. at 97.

Finally, the court's error stems, in part, from its undue emphasis on *one* traditional justification for cable franchising—a facility's use of public rights-of-way. Pet. App. 34a-35a. This Court long ago abandoned the notion that a legislature's authority to regulate business exists only where the business is somehow "affected with a public interest." See *Nebbia* v. *New York*, 291 U.S. 502, 536 (1934). By suggesting that the use of public rights-of-way is the only conceivable basis for distinguishing between facilities that may be subject to local franchising and those that may not, the court of appeals gave far too much weight to its own views of wise public policy, and far too little weight to the presumption of validity that attaches to Acts of Congress under the rational-basis test. See *Lyng* v. *International Union*,

UAW, 485 U.S. 360, 370 (1988); *Hodel* v. *Indiana*, 452 U.S. 314, 331-332 (1981).

ARGUMENT

I. IN APPLYING THE RATIONAL-BASIS TEST UNDER THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE, FEDERAL COURTS MUST UPHOLD A LEGISLATIVE CLASSIFICATION IF ANY FACTS REASONABLY MAY BE CONCEIVED TO SUPPORT THE CLASSIFICATION

A. Socio-Economic Legislation Must Be Sustained If Facts Reasonably May Be Conceived To Support It

"There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy." *Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963). That judicial assault on democratic institutions, however, ended long ago, when the Court returned "to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id.* at 730. "Differences of opinion" about "the wisdom, need, or appropriateness" of legislation are now thought to "suggest a choice which should be left where * * * it was left by the Constitution—to the States and to Congress." *Olsen* v. *Nebraska ex rel. Western Reference & Bond Ass'n*, 313 U.S. 236, 246 (1941); accord, *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 425 (1952). And this Court's contemporary decisions proceed from the premise that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy deter-

minations made in areas that neither affect fundamental rights nor proceed along suspect lines." *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976); see, *e.g.*, *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 165 (1973); *Ferguson* v. *Skrupa*, 372 U.S. at 731-732. Because federal courts lack the "authority and competence" to assume "a legislative role" (*San Antonio Indep. School Dist.* v. *Rodriguez*, 411 U.S. 1, 31 (1973)), a federal court passing on the wisdom of an Act of Congress "exceed[s] its proper role" under the Constitution. *Hodel* v. *Indiana*, 452 U.S. 314, 333 (1981).

This philosophy of judicial self-restraint supplies the framework for evaluating socio-economic legislation, such as the Cable Act, under the equal protection component of the Due Process Clause of the Fifth Amendment. See, *e.g.*, *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 175-176 (1980); *Vance* v. *Bradley*, 440 U.S. 93, 102 (1979); *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960). Under the "rational basis" test applicable to such legislation, this Court has held that "[w]here * * * there are plausible reasons for Congress' action, [judicial] inquiry is at an end." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 179. Accordingly, if "any state of facts reasonably may be conceived" to justify a "statutory distinction," the statute complies with equal protection principles, and Congress's policy determination must prevail. *Sullivan* v. *Stroop*, 496 U.S. at 485; accord, *Bowen* v. *Gilliard*, 483 U.S. 587, 601 (1987); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). Properly applied, the rational-basis test therefore ensures that federal courts have

"no power to impose * * * their views of what constitutes wise economic or social policy." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 175.

B. The Validity Of A Legislative Classification Under The Rational-Basis Test Does Not Require Evidence Of Supporting Facts To Be Placed On A Legislative Or Judicial Record

This Court has made clear that Congress has no duty under the Constitution to create a legislative record of the facts supporting its legislation. Indeed, far from imposing an "on-the-record" requirement, this Court has emphasized that if a rational basis for a statute can reasonably be conceived, "[i]t is * * * 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 179 (citation omitted); accord, *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 528 (1959); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 511 (1937); see also *Munn* v. *Illinois*, 94 U.S. 113, 132-133 (1877) ("[W]e must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed.").

A corollary of that principle is that when socio-economic legislation is attacked on equal protection grounds, the government does not have a burden of producing evidence to sustain the rationality of Congress's classification. First, socio-economic legislation is accorded a strong presumption of validity under the rational-basis test. See, *e.g.*, *Lyng* v. *In-*

ternational Union, UAW, 485 U.S. 360, 370 (1988). In fact, "such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel* v. *Indiana*, 452 U.S. at 331-332; see *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) ("The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.") Second, nothing in Article I of the Constitution, the Due Process Clause, or this Court's cases suggests that Congress may formulate policy only if its factual premises are provable by a preponderance of the evidence in a court of law. Rather, as this Court has made plain, a court's "responsibility for making 'findings of fact' * * * does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than * * * 'pure speculation.'" *Vance* v. *Bradley*, 440 U.S. at 111. In other words, Congress is authorized to speculate when addressing regulatory problems, and the rational-basis test—properly applied—ensures that the judiciary will not unduly circumscribe such efforts.[15]

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[15] In *United States* v. *Carolene Products Co.*, 304 U.S. 144, 154 (1938), the Court rejected a Fifth Amendment challenge to a statute prohibiting the interstate shipment of skimmed milk enhanced by fat other than milk fat. In so doing, the Court offered the following pertinent summary of the rational-basis test:

> [B]y their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it.

II. THE COURT OF APPEALS IMPERMISSIBLY REQUIRED THE CREATION OF AN ADMINISTRATIVE RECORD TO SUPPORT THE RATIONALITY OF 47 U.S.C. 522(6) (1988) AND ERRONEOUSLY HELD THAT THE STATUTE WAS UNSUPPORTED BY A RATIONAL BASIS

In holding unconstitutional the Cable Act's definition of "cable system" on the ground that its distinction between cable facilities serving separately rather than commonly owned buildings lacked a rational basis, the court of appeals made three related errors. First, the Court rejected the plausible assumptions about the effect of the "common ownership" requirement on consumer welfare, even though those assumptions easily satisfy the standard of rationality articulated in this Court's decisions. Second, the court did so because the Federal Communications Commission did not create an administrative record to support the classification. Third, the Court attached undue significance to the Commission's pre-Cable Act reliance on public rights-of-way as a rationale for franchising requirements.

A. The Court Of Appeals Erred In Rejecting The "Consumer Welfare" Rationale For The "Common Ownership" Requirement

Contrary to the court of appeals' decision, the "private cable" exemption in 47 U.S.C. 522(6)(B)

(1988) is rational. Reasonable assumptions about the practical effect of a "common ownership" requirement upon consumer welfare are sufficient to sustain the classification at issue. Common sense suggests that in contrast to cable facilities that serve separately owned units, a requirement of common ownership, control, or management imposes a relative constraint upon the size of the market being served by the relevant SMATV facilities. That constraint on size, in turn, provides each consumer of cable services greater leverage over the product supplied. A subscriber's leverage, moreover, is likely to be enhanced by the fact that all of the consumers will be able to use their status as unit owners or tenants to bring common pressure to bear on a single set of owners or managers who provide or purchase all of a facility's service. Accordingly, "Congress could have reasoned * * * that a SMATV facility serving buildings under common ownership is likely to be smaller, and the ability of residents to influence ownership likely to be greater, so that the costs of regulation could outweigh the benefits." Pet. App. 43a (separate opinion of Mikva, C.J.).

Indeed, the reasonable supposition underlying the "consumer welfare" rationale—that cable facilities serving commonly owned buildings are more likely to be less in need of regulation—finds support in the FCC's consistent pre-Cable Act policy of exempting facilities from regulation on that basis. The "private cable" exemption originated in the Commission's first cable regulations, which exempted from coverage "any * * * facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an

apartment house." *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683, 741 (1965).[16] Although the FCC's regulations changed in a number of respects over time, see generally *Malrite T.V.* v. *FCC*, 652 F.2d 1140, 1143-1147 (2d Cir. 1981), cert. denied, 454 U.S. 1143 (1982), the Commission retained the essentials of the "private cable" exemption throughout its revisions of the cable rules. See, *e.g.*, *Second Report & Order in Docket Nos. 14895, 15233, & 15971*, 2 F.C.C.2d 725, 797, 799, 801 (1966); *Cable Television Report & Order*, 36 F.C.C.2d 143, 214 (1972); *First Report & Order in Docket No. 20561*, 63 F.C.C.2d 956, 990-997 (1977); *Memorandum Opinion & Order in Docket No. 20561*, 67 F.C.C.2d 716, 725-726 (1978).[17]

Although the Commission's early cable rulemaking proceedings offered little insight into the reasons underlying the "private cable" exemption, the FCC later elaborated on the rationale for that exemption. Referring to the "private cable" exemption and the

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[16] Facilities with fewer than 50 subscribers were also exempt from coverage under those regulations. 38 F.C.C.2d at 741.

[17] That exemption was originally designed to exclude from regulation Master Antenna Television (MATV) systems, which receive normal broadcast signals through rooftop antennae and retransmit them by wire to multiple units within a single building or a commonly owned, controlled, or managed building complex. See Pet. App. 12a. As technology developed and SMATV systems came into being, the Commission made clear that the "private cable" exemption would apply to those systems as well. See *In re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223, 1224 n.3 (1983), aff'd *sub nom. New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804 (D.C. Cir. 1984).

(subsequently repealed) exemption for facilities that serve fewer than 50 subscribers, the Commission explained:

> [N]ot all [distribution systems] can be subject to effective regulation with the resources available nor is regulation necessarily needed in every instance. A sensible regulatory program requires that a division between the regulated and unregulated be made in a manner which best conserves regulatory energies and allows the most cost effective use of available resources. In attempting to make this division, *we have focused on subscriber numbers as well as the multiple unit dwelling indicia on the theory that the very small are inefficient to regulate and can be safely ignored in terms of their potential for impact on broadcast service to the public and on multiple unit dwelling facilities on the theory that this effectively establishes certain maximum size limitations.*

Memorandum Opinion & Order in Docket No. 20561, 67 F.C.C.2d 716, 726 (1978) (emphasis added); see *First Report & Order in Docket No. 20561*, 63 F.C.C.2d 956, 996 (1977).[18]

[18] In that docket, the Commission considered and rejected proposals to abandon the "private cable exemption" in favor of parity of treatment for MATV and traditional cable systems. See *First Report & Order in Docket No. 20561*, 63 F.C.C.2d at 996; *Memorandum Opinion & Order in Docket No. 20561*, 67 F.C.C.2d at 726. In addition to the limited size of a facility serving commonly owned units, the FCC noted that MATV systems typically pick up only off-the-air broadcast signals, and not distant signals, which makes those facilities less significant competitors in the video programming market. 63 F.C.C.2d at 996. The Commission therefore retained the regulatory distinction between MATV and traditional cable systems, including the "common ownership" requirement.

Although a statute's rationality certainly does not have to be reflected in pre-existing agency precedent,[19] the FCC's reasoning—after more than a dozen years of regulating cable—lends support to the plausible supposition that the "common ownership" requirement is a rational rule-of-thumb for determining when as a general matter the cost of regulating cable facilities will outweigh the benefits.[20] With a "common ownership" requirement, not only will each subscriber have more influence over a smaller facility, but Congress could reasonably have determined that the administrative costs associated with a franchise requirement would place an undesirable burden upon the typically smaller entities at issue. Cf. *United States* v. *Sperry Corp.*, 493 U.S. 52, 65

[19] On the other hand, the fact that a "common ownership" requirement has long been reflected in the Commission's regulations itself supports the rationality of Congress's decision to perpetuate that classification in the Cable Act. By continuing a longstanding regulatory policy, Congress's decision to retain the "common ownership" requirement rationally served the legitimate governmental interest of preserving the existing expectations of those in the cable industry. Cf. *Kadrmas* v. *Dickinson Public Schools*, 487 U.S. 450, 465 (1988); *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2333 (1992).

[20] Respondents suggest (Resp. Supp. Br. 8-10) that Commission precedents involving MATV have no relevance to SMATV. That contention is wrong. To be sure, SMATV differs from MATV in that SMATV is capable of receiving distant signals. But there is no reason that the more pertinent consideration—the likely size of a subscriber base drawn only from those units under common ownership—should differ for SMATV and MATV systems.

(1989) ("Congress could * * * have determined that assessing a user fee against all claimants would undesirably deter those whose claims were small or uncertain of success from presenting them to the [Iran-United States Claims] Tribunal.").[21]

It is true, as respondents contend (Br. in Opp. 14), that Congress could have simply provided that the term "cable system" shall not include any facility serving fewer than a specified number of subscribers. Under the rational-basis test, however, whether respondents "think Congress was unwise in not

[21] Respondents find it "inconceivable" (Resp. Supp. Br. 8) that Congress could have intended to relieve smaller facilities from regulation by enacting 47 U.S.C. 522(6)(B) (1988). That is the appropriate standard, but respondents are wrong. Because a facility's use of wire *within* a multi-unit building is insufficient to trigger the definition of "cable system" (5 F.C.C. Rcd. at 7640-7641; J.A. 13-20), respondents argue (Br. in Opp. 13) that an unfranchised SMATV operator may serve a limitless number of separately owned buildings by placing satellite dishes on each. However, as respondents also note (Br. in Opp. 13), doing so "escalate[s] the cost of serving separately-owned buildings, from the minor cost of a length of interconnecting cable strand to the major cost of [installing] an entire duplicative satellite headend facility" on each building. Thus, withholding exemption from facilities that serve separately owned buildings advances consumer welfare, by making it more costly for a SMATV operator to serve a large market of separately owned buildings without triggering the Cable Act's franchise requirements. In contrast, Congress could reasonably have concluded that such incentives triggering coverage were less warranted for cable facilities serving commonly owned buildings; under a "common ownership" requirement, a facility's franchise obligations will arise whenever it expands to serve subscribers whose dwellings are not under the same ownership, control, or management.

choosing a means more precisely related to its primary purpose is irrelevant." *Vance* v. *Bradley*, 440 U.S. at 109. It is a central assumption of the rational-basis test that "[t]he problems of government are practical ones and may justify * * * rough accommodations." *Dandridge* v. *Williams*, 397 U.S. at 485; see, *e.g.*, *City of Dallas* v. *Stanglin*, 490 U.S. at 27; *Vance* v. *Bradley*, 440 U.S. at 108 n.26. And this Court has repeatedly held that "rational distinctions may be made with substantially less than mathematical exactitude." *Burlington N. R.R.* v. *Ford*, 112 S. Ct. 2184, 2187 (1992); see, *e.g.*, *City of New Orleans* v. *Dukes*, 427 U.S. at 303; *Dandridge* v. *Williams*, 397 U.S. at 485; see also, *e.g.*, *Vance* v. *Bradley*, 440 U.S. at 108 (statute may satisfy rationality review even if it is "to some extent both underinclusive and overinclusive"). The constitutionality of the Cable Act, therefore, turns not on whether the pertinent classification could have been drawn more precisely, but on whether it is plausible to assume that, in general, facilities serving commonly owned units are more likely to serve smaller groups of subscribers. Because that assumption is consistent with common sense (as well as Commission precedent), it cannot be said that "the varying treatment" of facilities serving commonly, as opposed to separately, owned buildings is "so unrelated to * * * any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. at 97.

B. The Court Of Appeals Erred In Rejecting Plausible Reasons For The Classification In 47 U.S.C. 522(6) (1988) On The Ground That There Was No Evidence To Substantiate Them

Based on this Court's precedents, see pp. 17-19, *supra*, the constitutionality of the Cable Act "can be sustained by justifications in or out of the record." Pet. App. 40a (separate opinion of Mikva, C.J.). The court of appeals, however, did not follow that principle in this case, but invalidated an Act of Congress because of the absence of administrative findings to support the plausible justifications advanced in support of the Act.

To be sure, the court of appeals' decision remanding the case to the Commission purported to "assume" that a "conceivable basis," rather than an "articulated basis," would be sufficient to sustain the Cable Act's rationality. Pet. App. 35a. The majority's assertion, however, cannot be squared with its own observation that "[*o*]*n the record before us*, we fail to see a 'rational basis'" for the classification. *Id.* at 34a (emphasis added). It is also difficult to square the court's asserted fidelity to this Court's precedents with its decision to remand the case to secure "additional 'legislative facts'" from the FCC. *Id.* at 36a.

Respondents maintain (Br. in Opp. 23) that the court of appeals was not improperly asking the Commission to create an administrative record to support the classification in 47 U.S.C. 522(6) (1988), but was merely seeking its help in conceiving of legislative facts that might support it. The record, however, does not sustain that contention. In his separate opinion concurring in the remand, Chief Judge Mikva offered plausible justifications for the statu-

tory classifications at issue. Pet. App. 41a-43a. And the Commission agreed with his analysis on remand. *Id.* at 50a.[22] Yet, when the case was returned to the court after the remand, the court did not even purport to consider the merits of those stated justifications. Instead, the majority rejected the plausible assumption that cable facilities serving separately owned buildings are more likely to resemble traditional cable systems, because it had "no basis for assuming this." *Id.* at 4a. The court dismissed other proposed justifications because "the FCC has wholly failed to flesh these out." *Ibid.* Refusing to rely on what it deemed "naked intuition" (*ibid.*), the majority therefore invalidated as irrational the "com-

[22] Respondents contend (Br. in Opp. 20-21) that the Commission's report on remand was in fact a rejection of the policy underlying Congress's classification and that this fact somehow affects the constitutionality of the Act. That contention, however, is irrelevant. Insofar as the constitutional issue is concerned, the Commission endorsed Chief Judge Mikva's rational-basis analysis, agreeing that the classification is "reasonable." Pet. App. 50a. Because the justifications suggested by the separate opinion were sufficient to sustain the statute, it is irrelevant that the Commission was unaware of any further justifications "beyond those suggested by Judge Mikva." *Ibid.* Contrary to respondents' suggestion, moreover, it makes no difference whether the classification at issue reflects the Commission's own policy preferences. As the court of appeals (Pet. App. 19a-25a) and the Commission (5 F.C.C. Rcd. at 7641; J.A. 20-22) recognized, the Cable Act is clear in establishing the "common ownership" requirement at issue here. We are aware of no decision holding a statute unconstitutional on the ground that an administrative agency has expressed a policy preference different from the one expressed in the plain language of the statute.

mon ownership" requirement in 47 U.S.C. 522 (6)(B) (1988). Pet. App. 4a, 6a.[23]

Based on that reasoning, it is evident that the majority was in fact asking the Commission to create an administrative record giving factual substantiation to what the majority was simply unwilling to assume. But under this Court's rational-basis decisions, "the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the

[23] The court's initial decision had also raised the question of the Act's disparate treatment of SMATV facilities that interconnect separately owned buildings by wire (and are "cable systems") and those that use nonphysical transmission media to link such buildings (and are not "cable systems"). Pet. App. 34a-36a. And respondents attempt to argue that if Congress sought to protect consumers by regulating facilities with a larger subscriber base, "it makes no sense that Congress did not also seek to restrict the market size of locally unregulated 'wireless' operators." Br. in Opp. 16. Following remand, however, the court of appeals expressly declined to reach the validity of exempting wireless facilities while regulating facilities that interconnect separately owned buildings through physical transmission media (Pet. App. 3a), and that question is not presented here. Respondents' argument is, therefore, a thinly cloaked effort to raise an issue not properly before this Court. In any case, respondents err in contending that if Congress chooses to regulate some types of facilities with a large subscriber base, it must regulate them all. See *Flemming* v. *Nestor*, 363 U.S. at 612 ("[I]t is * * * constitutionally irrelevant that * * * the [statute] does not extend to all to whom the postulated rationale might in logic apply."); *United States* v. *Petrillo*, 332 U.S. 1, 8 (1947). In fact, there is a rational basis for exempting wireless technologies that has nothing to do with consumer protection; Congress may have been trying to provide a deregulatory incentive to switch to such technologies. See Pet. App. 42a (separate opinion of Mikva, C.J.).

light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within 'the knowledge and experience of the legislators." *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1938) (Stone, J.). By refusing to assume the existence of the plausible state of facts brought to its attention, the court of appeals failed to give sufficient weight to that presumption of validity. It also failed to heed this Court's admonition that courts are without authority "to reject the legislative judgment on the basis that wihout convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than * * * 'pure speculation.'" *Vance* v. *Bradley*, 440 U.S. at 111. In so doing, the court misapplied the settled law reflected in this Court's rational-basis decisions.

C. The Court Of Appeals' Rejection Of The Plausible Assumptions Supporting The Classification Cannot Be Squared With The Application Of The Rational-Basis Test By This Court

Given the plausibility of the justifications supporting the classification, the majority's insistence that legislative justifications be "flesh[ed] * * * out" on an administrative record and its refusal to "assum[e]" any facts that were not part of the record (Pet. App. 4a) cannot be squared with this Court's decisions applying the rational-basis test.

For example, in *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 108 (1949), this Court reviewed a municipal ordinance prohibiting the placement of advertisements upon trucks, except for "business notices upon business delivery vehicles * * * engaged in the usual business or regular work of the

owner and not used merely or mainly for advertising." The Court rejected an equal protection challenge alleging that the distinction between general advertisement and self-advertisement was "not justified by the aim and purpose" of reducing distractions. 336 U.S. at 109. In sustaining that classification, the Court reasoned:

> The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants.

Id. at 110. In contrast with the majority's approach in this case, the Court's decision in *Railway Express* did not hesitate to make assumptions about "the nature [and] extent" (*ibid.*) of self-advertisements on vehicles, without a factual record supplied by the City. Nor did it have any administrative record to "flesh * * * out" (Pet. App. 4a) its assumptions about the dissimilarity of the two pertinent kinds of advertising. Rather, because it was able to conceive of plausible facts, the assumption of which justified the classification, the Court sustained the law.

Similarly, in *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955), the Court upheld the rationality of an Oklahoma law that prohibited opticians from fitting or duplicating glasses without a prescription, but exempted sellers of "ready-to-wear" glasses. In rejecting the opticians' equal protection claim, the Court explained:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Id. at 489 (citations omitted). Applying those principles, the Court upheld the contested classification. *Ibid.* Contrary to the decision here, *Lee Optical* imputed rationality to the process of legislative line drawing when the evidence of record did not definitively foreclose the existence of plausible facts supporting it.

More recently, the Court in *Vance* v. *Bradley*, 440 U.S. 93 (1979), strongly reaffirmed that principle in rejecting an equal protection attack upon a statute requiring members of the Foreign Service to retire by the age of 60. In response to the plaintiffs' apparent contention that the classification could be sustained only upon submission of "empirical proof that health and energy tend to decline somewhat by age 60" (*id.* at 110), the Court responded:

> [T]his case, as equal protection cases recurringly do, involves a legislative classification contained in a statute. In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legis-

> lative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

Id. at 110-111. Finding the facts to be "arguable," the Court held that the legislative judgment reflected in the statute was "immun[e] from constitutional attack" under rationality review. *Id.* at 112.

The next year, in *United States R.R. Retirement Bd.* v. *Fritz*, *supra*, the Court upheld the Railroad Retirement Act of 1974, which prospectively eliminated a railroad retiree's ability to collect both social security and railroad retirement benefits. The case arose because the Act grandfathered dual benefits for those who had between 10 and 25 years of railroad employment, but only if the employee worked for a railroad in 1974 or had a "current connection" with a railroad as of the transitional date of the Act (December 31, 1974) or the date of his actual retirement thereafter. 449 U.S. at 166, 172-174. After reaffirming its general reluctance to invalidate a social or economic statute because it is "unwise or unartfully drawn" (*id.* at 175), this Court upheld the Act's "current connection" test on the ground that "Congress could assume that those who had a current connection with the railroad industry when the [Railroad Retirement] Act was passed in 1974, or who [had] returned to the industry before their retirement, were more likely than those who had left the industry prior to 1974 and who never returned, to be among the class of persons who pursue careers in the railroad industry, the class for whom the * * * Act was designed." *Id.* at 178. Because a plausible ground could be conceived for the challenged classification, the Court declined to overturn Congress's policy judgment

—even though those factual assumptions were neither explicitly stated nor empirically verified.

And last Term in *Burlington N. R.R.* v. *Ford*, *supra*, this Court upheld a Montana venue law pursuant to which a plaintiff may "sue a domestic company in just the one county where it has its principal place of business, while a plaintiff may sue a foreign corporation in any of the State's 56 counties." 112 S. Ct. at 2186. Burlington argued that the statute was unconstitutional as applied to a foreign corporation that "not only has its home office in some other state or country, but also has a place of business in Montana that would qualify as its 'principal place of business' if it were a Montana corporation." *Id.* at 2187. This Court rejected Burlington's claim, upholding the classification on the ground that

> Montana could reasonably have determined that a corporate defendant's home office is generally of greater significance to the corporation's convenience in litigation than its other offices; that foreign corporations are unlikely to have their principal offices in Montana; and that Montana's domestic corporations will probably keep headquarters within the State.

Ibid. With those assumptions in mind, the Court concluded that Montana may have found that the convenience to a defendant corporation outweighed the plaintiff's interest in forum selection only when the corporation was able to litigate "in the county containing its home office." *Ibid.* Of significance here, the Court did not require factual substantiation of its assumptions; rather, it noted merely that "[w]e cannot say, at least not on this record, that any of these assumptions is irrational." *Ibid.*

This Court's decisions in *Railway Express*, *Lee Optical*, *Vance*, *Fritz*, and *Burlington* reflect faithful applications of the well settled principle most recently reiterated in *Sullivan* v. *Stroop*—that a socio-economic classification does not violate equal protection principles "if any state of facts reasonably may be conceived to justify it." 496 U.S. at 485.[24] Those decisions, moreover, clearly instruct that, where socio-economic legislation is involved and the rational-basis standard applies, a reviewing court must indulge the democratic process by crediting plausible, but unverified, assumptions and by relying on common sense,

[24] For other decisions implicitly or explicitly applying that principle, see, *e.g.*, *Bowen* v. *Gilliard*, 483 U.S. 587, 599 (1987) (upholding statute reducing welfare payments for families receiving child support, based upon Congress's "assumption that child support payments * * * are generally beneficial to the entire family unit" and upon "the common sense proposition" that shared expenses reduce per capita cost of living with others); *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 410 (1982) ("[T]he tolling provision is premised on a reasonable assumption that unrepresented foreign corporations, as a general rule, may not be so easy to find and serve."); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307, 315-316 (1976) (upholding law requiring police to retire at age 50, because "[t]here is no indication that [the statute] has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute"); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961) (sustaining exemption of products from prohibition against Sunday sales because "a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day," and because the record "is barren of any indication that this apparently reasonable basis does not exist").

even when it is unsupported by legislative or administrative findings of fact. In contrast, the majority in this case never addressed the merits of the plausible, common sense justifications advanced in the separate opinion and endorsed by the FCC. Rather, the court simply refused (Pet. App. 4a) to "assum[e]" unverified facts or to credit any rationale that was not "flesh[ed] * * * out" in an administrative record. Under this Court's decisions, that refusal was error.

D. The Court Erred In Heavily Emphasizing Public Rights-of-Way As A Rationale For Local Franchising

The court of appeals' error in this case is attributable, in part, to its misplaced emphasis on the Commission's traditional reliance on use of public rights-of-way as a basis for subjecting cable facilities to local franchise requirements. See Pet. App. 34a-35a. Noting that that traditional rationale does not explain the distinction between facilities serving separately and commonly owned multiple unit dwellings, the court was "unable to imagine" any alternative basis for the rationale. *Id.* at 35a. The court's suggestion that a cable facility's use of public rights-of-way is the only imaginable basis for distinguishing between facilities properly subject to and immune from local regulation cannot be credited under this Court's cases.[25]

[25] The court of appeals also cites (Pet. App. 35a) passages from the Cable Act's legislative history suggesting that the premise of local jurisdiciton over cable facilities is the use of local streets and rights-of-way. However, the court of appeals held, and respondents do not contest in this Court, that the Cable Act in fact applies local franchising requirements to certain facilities that use no public rights-of-way. Pet. App.

It is true that a facility's use of public rights-of-way has been a crucial factor in allocating responsibility over cable to local governments. See, *e.g.*, *New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804, 808-811 (D.C. Cir. 1984); *Cable Television Report & Order*, 36 F.C.C.2d 143, 207 (1972). However, it is one thing to say that the use of public rights-of-way is a legitimate justification for requiring local franchising of cable services, and quite another to conclude (as the court did here) that there is no other conceivable interest that will support the Cable Act's franchising distinctions. To insist upon the use of public rights-of-way as a constitutional prerequisite to franchising would be reminiscent of this Court's long-abandoned case law requiring that a business must somehow be "affected with a public interest" before it may be subjected to certain kinds of regulation. See, *e.g.*, *Tyson & Brother* v. *Banton*, 273 U.S. 418, 430 (1927) (striking down law regulating theater ticket prices); *Munn* v. *Illinois*, 94 U.S. 113, 130-132 (1877) (upholding regulation of grain elevator rates).

19a-25a. The fact that the legislative history does not explicitly state a rationale for such a franchising requirement does not justify invalidation of the statute on rational-basis grounds. See *United States R.R. Retirement Board* v. *Fritz*, 449 U.S. at 179 ("[T]his Court has never insisted that a legislature articulate its reasons for enacting a statute," particularly "where the legislature must necessarily engage in a process of line-drawing."); *Flemming* v. *Nestor*, 363 U.S. at 612 (finding it "constitutionally irrelevant" whether the rational reasons for a classification "in fact underlay the legislative decision"); see also *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history.").

That approach has been discarded as "an unsatisfactory test of the constitutionality of legislation directed at business practices or prices." *Nebbia* v. *New York*, 291 U.S. 502, 536 (1934). And the pertinent constitutional question—whether "an industry, for adequate reason, is subject to control for the public good" (*ibid.*)—is now to be answered by examining whether there are "plausible reasons for Congress' action" (*United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 179) or whether "any state of facts reasonably may be conceived" to justify a law (*Sullivan* v. *Stroop*, 496 U.S. at 485). Under that standard, there is assuredly a constitutionally sufficient interest in assigning local authorities the power to engage in such measures as rate regulation, consumer protection, and the like (see, *e.g.*, 47 U.S.C. 543, 552 (1988)), without regard to whether a facility crosses public rights-of-way. And as we have shown —for reasons that have nothing to do with the use of public rights-of-way—there is a rational basis for distinguishing between the need for regulating facilities that serve separately, as opposed to commonly, owned multiple-unit dwellings. In short, the court of appeals' discussion of public rights-of-way is irrelevant to the validity of the classification at issue.[26]

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[26] In any case, pre-Cable Act precedent applied the "private cable" exemption without regard to the crossing of public rights-of-way. In a number of cases, the Commission declined to apply the "private cable" exemption, even though a facility was located wholly on private land and crossed no public rights-of-way. See, *e.g.*, *In re Citizens Dev. Corp.*, 52 F.C.C.2d 1135, 1137 (1975) (private community development); *In re Application of Bayhead Mobile Home Park*, 47 F.C.C.2d 763, 763-764 (1974) (requiring franchising of mobile home park located on private land). In addition, respondents err in rely-

* * * * *

As Chief Judge Mikva observed: "The Cable Act is a large and complex piece of socioeconomic legislation, an effort to establish a comprehensive regulatory scheme for the cable industry, a product of public hearings, private negotiations, and compromise. SMATV operators, the [respondents] in this suit, participated actively in the process and, in fact, did quite well." Pet. App. 40a-41a. It is true that on the matter at issue here, respondents "lost a political battle in which [they] had a strong interest." *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. at 179. "[B]ut this is neither the first nor the last time that such a result will occur in the legislative forum" (*ibid.*), and "[t]he Constitution presumes that, absent some * * * antipathy [to the burdened parties], even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter

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ing (Br. in Opp. 7-10; Resp. Supp. Br. 2-3) on *In re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983), aff'd *sub nom. New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804 (D.C. Cir. 1984), to show that the crossing of public rights-of-way was determinative of the permissibility of local regulation of SMATV prior to the Cable Act. To be sure, the FCC in that docket preempted state and local regulation of SMATV facilities. 95 F.C.C.2d at 1235. The FCC, however, was careful to emphasize that "SMATV systems serving one or more multiple unit dwellings under common ownership, control, or management * * * are the subject of this proceeding," and that "SMATV systems which are defined as cable television systems by this Commission are not under scrutiny here." *Id.* at 1224 n.3. Accordingly, contrary to respondents' suggestion, *Earth Satellite* says nothing about the justifiability of imposing local franchising requirements upon cable facilities serving separately owned buildings without crossing public rights-of-way.

how unwisely we may think a political branch has acted." *Vance* v. *Bradley*, 440 U.S. at 97 (footnote omitted). Given the plausible justifications set forth by the dissenting judge in this case and seconded by the FCC, Congress's judgment about franchising facilities serving separately owned units was essentially "one of policy, and this kind of policy, under our constitutional system, ordinarily is to be 'fixed only by the people acting through their elected representatives.'" *Id.* at 102.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 92-603

IN THE
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Petitioners,

v.

BEACH COMMUNICATIONS, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION

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The National Cable Television Association, Inc. (NCTA), an intervenor in the court below and a respondent in this Court, files this brief supporting reversal of the decision of the United States Court of Appeals for the District of Columbia Circuit. NCTA is the principal trade association of the cable television industry in the United States, representing the owners and operators of cable systems serving over 90 percent of the nation's 56.2 million cable households. Its members also include cable programmers, cable equipment manufacturers, and others associated with the cable industry.

STATEMENT

The sole issue in this case is the constitutionality, under the rational-basis test, of a distinction drawn by Con-

gress in the Cable Communications Policy Act of 1984 ("the Cable Act") between two types of providers of video programming. Under the Act, a "cable system" is required to obtain a local franchise, 47 U.S.C. § 541 (b)(1), and is subject to various other regulatory requirements. A "cable system" is defined as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment" that provides "cable service which includes video programming . . . to multiple subscribers within a community." *Id.* § 522(6). The Act, however, excludes from the definition a system that serves "only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management" and that does not "use[] any public right-of-way." *Ibid.* The systems falling within this exception are generally referred to as "satellite master antenna television systems" or "SMATVs."

Respondents Beach Communications, Inc. *et al.* (hereinafter "respondents") sought in this case to extend the SMATV exemption to other systems that, without using public rights-of-way, interconnect groups of apartment or condominium buildings that are not under "common ownership, control, or management." Among their claims was the argument that it was irrational, under the equal-protection component of the Fifth Amendment, for Congress to draw a distinction between otherwise similar systems based on whether the buildings involved are owned or managed in common. The D.C. Circuit ultimately agreed with this argument, holding the Cable Act unconstitutional to the extent that it adopted this distinction.

This case came to the D.C. Circuit on a petition to review an interpretation of the Cable Act by the Federal Communications Commission (the "FCC" or "Commission") that tracked the statutory language—*i.e.*, it limited the SMATV exception to systems that (1) do not use public right-of-way and (2) include only commonly

owned or managed buildings. In addition to raising equal-protection claims, respondents argued that the statute should be interpreted to exempt their systems, and they asserted a claim under the First Amendment. In its first opinion in the case, the D.C. Circuit rejected the statutory argument, holding that the FCC's interpretation was fully consistent with the Act. Pet. App. 19a-25a. The court also held that the First Amendment claim was not ripe, because no locality had yet determined what kind of regulatory requirements to impose on systems that do not use rights-of-way but still must obtain franchises under the Act. *Id.* at 25a-31a.

Turning to the equal-protection claim, the court stated that "[o]n the record before us, we fail to see a 'rational basis'" for drawing a distinction between otherwise similar systems based on whether the buildings involved are under common ownership or control. *Id.* at 34a-35a.[1] The court observed that "[t]he fact that cable television uses public rights-of-way has been the predominant rationale for local franchising," *id.* at 34a, and then stated that this rationale could not justify distinctions among video providers that did not use rights-of-way. The court found no alternative explanation in "the congressional reports and debates on the Cable Act." *Id.* at 35a. It thus announced that—even assuming that only a "conceivable basis" for the distinction was needed—it could not "imagine *any* basis for the distinction." *Ibid.* (emphasis in original).[2]

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[1] The court referred to systems connecting buildings under common ownership and control as "wholly private" systems and to systems connecting independently owned and managed buildings as "external, quasi-private" systems.

[2] The court also questioned whether there is a rational basis for a second distinction in the statute—between (1) systems that use wires to interconnect buildings under separate ownership and control and (2) systems that perform a similar function but use wireless

The court did not, however, directly vacate the FCC's interpretation of the Act. Noting that a court might "'resort to extra-record information'" or seek to obtain "'more evidence,'" *ibid.* (quoting *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)), the court found that it needed "additional 'legislative facts'" concerning the distinctions drawn by the Act, *id.* at 36a. It thus remanded the case to the Commission for it "to consider . . . whether there is some 'conceivable basis'" for those distinctions. *Ibid.*

Judge Mikva, in a separate opinion, disagreed with the majority's apparent holding that facts in the administrative record were required in order to uphold the statutory distinctions as rational. *Id.* at 40a. He identified conceivable bases for these distinctions that were sufficient, in his view, to render them constitutional. As Judge Mikva saw it, Congress could reasonably have concluded that SMATVs serving dwellings under common ownership or control are less in need of regulation than systems covering independently owned and controlled dwellings, because they are likely to be smaller and more responsive to consumers. *Id.* at 42a-43a.[3] He concurred in the remand to the FCC, however, because the Commission had not replied to the merits of respondents' equal-protection arguments, relying instead solely on the contention that they were unripe. *Id.* at 44a-45a.

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technologies to interconnect the buildings and use wires only within each building. Pet. App. 35a (referring to "internal" systems). Because the court saw no rational basis for the various distinctions in the statute, it did not address respondents' argument that these distinctions warranted heightened equal-protection scrutiny because they implicate the exercise of fundamental First Amendment rights. *Id.* at 32a.

[3] Judge Mikva also argued that it was rational to extend an exemption to systems that do not use wires to interconnect multiply owned and controlled dwellings as a means of encouraging use of new, wireless technologies. Pet. App. 41a-42a.

Following the order of remand, the FCC filed a report with the court of appeals, stating that it could not "provide additional 'legislative facts,' beyond those provided by Judge Mikva in his concurring opinion, in justification of the distinctions set forth in the Cable Act." *Id.* at 47a. The Commission stated its belief, however, "that the justifications for the challenged distinctions offered in the concurring opinion should satisfy an appropriate rational basis test." *Id.* at 52a. *See also id.* at 50a ("The Commission agrees with Judge Mikva's analysis of rational-basis review of Acts of Congress, and believes that the Court should have affirmed the Commission's decision as consistent with a reasonable line drawn in the Cable Act definition.").

The court of appeals then found to the contrary. After reviewing the report by the Commission, it said it could "conceive of no reason" for Congress to have drawn a distinction between systems that do not use public rights-of-way based on whether the dwellings they serve are under common ownership, management or control. *Id.* at 3a-4a. Although Judge Mikva had suggested that systems serving independently owned and controlled buildings might be viewed by Congress as more similar to traditional cable systems, and thus as meriting similar regulation, the court said that it "ha[d] no basis for assuming this." *Id.* at 4a. Moreover, noting that Judge Mikva had also advanced "putative justifications" for the distinction, the court pointed out that "the FCC has wholly failed to flesh these out, or to suggest some alternative rationale." *Ibid.* It thus concluded that the rationale of "similarity" was nothing more than "a naked intuition, unsupported by conceivable facts or policies." *Ibid.*[4]

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[4] The court held that the appropriate remedy, to eliminate the distinction found to be irrational, was to exempt from the franchising requirement those systems serving separately owned and controlled dwellings (and not using public rights-of-way), rather than to extend the franchising requirement to all SMATVs. *Id.* at

(majority is "unable to imagine *any* basis for the distinction"). 25 (majority remands record for FCC to consider "whether there is some 'conceivable basis' " for the distinction).

The Commission agrees with Judge Mikva's analysis of rational-basis review of Acts of Congress, and believes that the Court should have affirmed the Commission's decision as consistent with a reasonable line drawn in the Cable Act definition. *See* concurring statement at 1-4. It appears that the majority in this case has a different view, however. And the majority apparently already has rejected the considerations, grounded in the Cable Act, that were put forward in the concurring opinion. From its review, after remand, of the relevant legislative history and of its own policy preferences, the Commission is unaware of any desirable policy or other considerations—beyond those suggested by Judge Mikva in his concurring opinion—that would support the challenged distinctions. Moreover, as noted earlier, even if the majority were to accept some or all of such considerations as a "rational basis" justification for some of the distinctions involved in this case, the majority opinion indicates that other equal protection questions then would arise—questions whose resolution might result in substantially broader regulation of video delivery systems than either the Commission or, in our view, Congress ever intended. *See* slip opinion at 21-22 & n. 17.

As the Court may recall,[3] the Commission in an earlier interpretation of the cable definition had taken the position that, when multiple unit dwellings are involved, a facility's use of the public right-of-way should be the sole basis for determining the facility's

[3] *See* FCC Brief, pp. 3-6.

status as a cable system and therefore its susceptibility to local franchise regulation.[4] Under that interpretation, which reflected the Commission's own policy preference, none of the facilities under consideration here would have been subject to franchise regulation under the Cable Act. When this earlier interpretation subsequently was rejected by a federal district court as "contraven[ing] unambiguous Congressional intent,"[5] the Commission reconsidered its earlier position.

Reexamining the statute, the Commission concluded —and this Court has agreed—that the plain language of the statute does not exempt facilities serving multiple unit dwellings from cable regulation unless (1) the dwellings are under "common ownership, control or management" and (2) no use is made of the public right-of-way. The Commission's current interpretation of the cable definition, which results in the regulatory distinctions that are challenged on equal protection grounds, was dictated by the unambiguous language of the statute, and not by any policy determination by the FCC in support of that interpretation.

The Court should be aware that significant cable legislation is before Congres now, *see, e.g.*, H.R. 4850, 102d Cong., 2d Sess. (1992), and that Congress in the context of considering that legislation will have an opportunity to revise the definitional provisions of the 1984 Act if it chooses. Some interested parties have brought the Court's decision in this case to the atten-

[4] *Cable Communications Act Rules*, 58 Rad. Reg. 2d (P&F) 1, *modified*, 104 FCC 2d 386 (1986), *aff'd in part and rev'd in part, American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

[5] *City of Fargo v. Prime Time Entertainment, Inc.*, No. A3-87-47, slip opinion at 9 (D.N.D., March 28, 1988) (Appendix A to FCC Brief).

tion of the relevant committees and have suggested legislative language to address the equal protection question identified in the majority opinion in this case.

CONCLUSION

The Commission believes that the justifications for the challenged distinctions offered in the concurring opinion should satisfy an appropriate rational basis test. The Commission's further review of the Cable Act's purposes, however, has suggested no additional and meritorious policy considerations that might justify those distinctions. Moreover, as we have pointed out, any policy considerations the Commission might be able to add at this time might have the anomalous result of extending regulation to facilities that neither the Commission nor, in our view, Congress intended it to reach as a matter of policy. In these circumstances, the Commission respectfully declines to offer additional "legislative facts" that might enable the Court to resolve the initial equal protection question it has identified.

Respectfully submitted,

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Supreme Court of the United States
OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
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Petitioners,

v.

BEACH COMMUNICATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN SUPPORT

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN SUPPORT

The National Cable Television Association, Inc. ("NCTA") respectfully submits this brief in support of the Petition for Writ of Certiorari filed by the Solicitor General on behalf of the United States and the Federal Communications Commission ("Petitioner"). NCTA is the principal trade association of the cable television industry in the United States, representing the owners and operators of cable systems serving over 90 percent of the nation's 56.2 million cable households.[1] Its members also include cable programmers, cable equipment manufacturers and others affiliated with the cable television industry.

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[1] NCTA has no parent companies, subsidiaries, or affiliates.

NCTA was an intervenor in the proceeding below and is, therefore, a respondent in this proceeding.

INTRODUCTION

This case involves the constitutionality of the line Congress drew to decide which communications entities should be defined as "cable systems" and therefore subject to the provisions of the Cable Communications Policy Act of 1984 (the "Cable Act").[2] A divided panel of the United States Court of Appeals for the District of Columbia Circuit found unconstitutional, under the equal protection component of the Fifth Amendment, Congress' distinction based on the common ownership, management or control of the "multiple unit dwellings" served by satellite master antenna television systems ("SMATVs").

The appellate court purported to apply this Court's deferential test for determining the validity of Congress' legislative classification under the Fifth Amendment. Yet the court rejected the rationality of the distinctions in the so-called "SMATV" exception to the "cable system" definition in the Act as lacking any "conceivable basis." But such a basis surely exists, articulated in the separate concuring opinion of Judge Mikva, in the prior precedent of the expert agency that had originally adopted this distinction, and endorsed by the Federal Communications Commission ("FCC" or "Commission"). This Court should grant Petitioner's request for certiorari to correct the errors in the court of appeals' approach to the "rational basis" test and to prevent the inequities in treatment between functionally equivalent communications services that the appellate court's erroneous decision will cause.

STATEMENT OF THE CASE

At issue here is Congress' different treatment of communications facilities providing cable service to subscribers. Congress established in the Cable Act a compre-

[2] 47 U.S.C. Section 521 *et seq.*

hensive national policy and framework for the regulation of cable television systems at both the federal and local level. As part of that regulatory structure, it imposed a requirement in the Act that a cable operator providing cable service over a cable system obtain a franchise.[3]

Congress defined a "cable system" for purposes of the Act as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community. . . .[4]

Congress also drew several narrow exceptions to the definition, including an exemption that mirrors the FCC's longstanding policy for excluding a facility that serves "only subscribers in one or more multiple unit dwellings under common ownership, control, or management. . . ."[5] And Congress narrowed this "common ownership" exception to apply only if the facility serving commonly owned

[3] 47 U.S.C. Section 541(b)(1) (providing that, except for exemptions not relevant here, "a cable operator may not provide cable service without a franchise.") A "cable operator" provides "cable service" over a "cable system". 47 U.S.C. Section 522(4).

[4] 47 U.S.C. Section 522(6); Cable Act, Section 602(6).

[5] The policy was incorporated in the FCC's "community antenna television system" definition adopted in 1965. *See Rules re Microwave-Served CATV*, 38 F.C.C. 683, 741 (1965) (defining "community antenna television system" to exclude "any . . . facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house."), *aff'd, Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968). The "private cable" exemption continued throughout the FCC's pre-Act regulations. 47 C.F.R. Section 76.5(a)(2) (1984) ("cable system" defined to exclude "[a]ny facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control or management.")

multiple dwelling units does not use any public right-of-way.[6]

In initially construing the Cable Act definition, the FCC interpreted the addition of the right-of-way restriction to indicate Congress' intent that the use or non-use of public rights-of-way be the sole determinant of whether a facility serving multiple dwelling units was a "cable system".[7] According to the Commission, systems that did not use public rights-of-way were covered by the "SMATV exception" of the new Act, even if the multiple buildings served were not commonly owned, controlled or managed. But after a judicial decision disputed the Commission's interpretation,[8] the agency recognized that the statutory language extended the SMATV exception only to systems that served commonly owned multiple dwelling units *and* did not use public rights-of-way.[9]

Several SMATV operators, led by respondent Beach Communications, sought judicial review of the Commission's interpretation on statutory and constitutional grounds. The court below rejected the statutory challenge, finding that under the plain language of section 602(6), systems that serve multiple unit dwellings that are not commonly owned are cable systems regardless of whether they use public rights-of-way. According to the court, "this plain meaning is neither absurd, nor contra-

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[6] 47 U.S.C. Section 522(6); Cable Act, Section 602(6).

[7] *Amendment of Parts 1, 63, and 76*, 104 F.C.C.2d 386, 396-97 (1986) ("when multiple unit dwellings are involved, the distinction between a cable system and other forms of video distribution systems is now the crossing of public rights-of-way, not the ownership, control or management.") The FCC recognized that this interpretive change would mean that many facilities that previously were considered cable systems would no longer be so considered. *Id.* at 397.

[8] *City of Fargo v. Prime Time Entertainment*, No. A3-87-47 (D.N.D. 1988).

[9] *Definition of a Cable Television System*, 5 FCC Rcd. 7638 (1990).

dicted by the legislative history."[10] Furthermore, the court recognized that in adopting the common ownership provision, Congress "incorporated verbatim the Commission's prior 'private cable' provision . . .",[11] and that "the plain meaning of Section 602(6) is made fully intelligible by the regulatory history predating the Cable Act. . . ."[12]

Nonetheless, in reviewing the constitutionality of these distinctions, the court reached the seemingly inconsistent conclusion that "on the record before us, we fail to see a 'rational basis' for franchising" systems serving separately owned multiple unit dwellings but not those serving commonly owned buildings.[13] The court "assume[d]" that minimum equal protection scrutiny requires only a " 'conceivable basis', not an 'articulated basis.' " But the court was "unable to imagine *any* basis for the distinction."[14] The court remanded to the agency to obtain "additional 'legislative facts' " concerning the distinction.[15]

In a separate statement, Judge Mikva offered several persuasive justifications for the distinction. Judge Mikva posited that the distinction between SMATVs based on separate or common ownership of the dwellings served could well reflect the belief that the former is more like a traditional cable system than the latter and "likely to give rise to similar problems from the perspective of the

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[10] Pet. App. 25a.

[11] The court, however, noted that Congress made "one important" change by adding the "public right-of-way" restriction to the exemption. *Id.* at 15a.

[12] *Id.* at 22a.

[13] *Id.* at 34a. The court also questioned the different treatment of systems serving separately owned buildings by *radio waves* and those serving by *wire*. Since the court did not feel it necessary to reach the constitutionality of this distinction, and since this question has not been raised by Petitioner, we do not address the reasons for the distinction herein.

[14] *Id.* at 35a.

[15] *Id.* at 36a.

viewer." [16] According to Judge Mikva, Congress also could have concluded that a facility serving commonly owned buildings "is likely to be smaller, and the ability of residents to influence ownership likely to be greater, so that the costs of regulation could outweigh its benefits." *Id.* Congress also could have determined, according to Judge Mikva, "that regulation of facilities serving multiply owned buildings is a reasonable way to enhance the diversity of broadcast information, while SMATV systems serving buildings commonly owned are, again, likely to be smaller and not in need of regulation." [17]

Given that several of Judge Mikva's rationales underlay the original FCC cable system definition essentially codified by Congress in the Cable Act, it is not surprising that the FCC in its Report to the court agreed with Judge Mikva's analysis. However, the Commission declined to offer additional "legislative facts" to explain Congress' intent.[18]

Nonetheless, after reviewing the Commission's response, a divided court of appeals again rejected these justifications. The majority found no basis for assuming that a facility serving separately owned buildings is more similar to a conventional cable system, and that in any event,

[16] *Id.* at 43a.

[17] *Id.*

[18] Report of Respondent Federal Communications Commission in Response to Opinion of March 6, 1992, Pet. App. at 50a. Nonetheless, the Commission feared that expressing any additional policy justifications might lead to the court extending the cable system definition to cover facilities, such as those interconnecting *commonly* owned multiple unit dwellings by cable, that the FCC had never considered to be a cable system. *See id.* at 52a. And while the Commission itself may now have preferred a different policy outcome and therefore did not offer an affirmative endorsement of the distinction drawn, *see id.* at 51a, even the Commission "believe[d] that the justifications for the challenged distinction offered [by Judge Mikva] should satisfy an appropriate rational basis test." *Id.* at 52a.

the "mere impression of 'similarity', without more, does not amount to a 'rational basis'." [19] The majority characterized Judge Mikva's explanations as "putative justifications" that amounted to "naked intuition, unsupported by conceivable facts or policies." [20] On this basis, it found the Cable Act unconstitutional in part, insofar as it requires franchises for systems serving separately owned buildings but not systems serving commonly owned buildings.[21] The court held, accordingly, that SMATVs that did not use public rights-of-way were not to be treated as cable systems for purposes of the Act's franchising requirements, regardless of whether or not the buildings that they served were commonly owned.[22] Judge Mikva dissented.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals misapplied standards set forth by this Court for reviewing the constitutionality of an act of Congress. It failed to accord Congress the requisite deference in legislating, deference that extends to precisely the sort of line-drawing embodied in the Cable Act.

While Congress did not expressly explain the basis for its classification, this Court has established that Congress need not articulate why it has adopted a particular distinction where, as here, there is no invidious discrimination between protected classes. All that is required is a "conceivable" basis for this distinction. In this case, the

[19] *Id.* at 4a.

[20] *Id.*

[21] *Id.* at 3a.

[22] The court expressed no opinion on whether any other aspects other than the franchising provision of the Cable Act would remain applicable to non-exempt SMATV systems, and in fact suggested that in its view, certain provisions of the Cable Act—such as the anti-obscenity provision—might continue to apply to SMATVs. *Id.* at 6a n.5.

dissenting judge and the expert agency identified rationales for the distinction. This Court's review is warranted and necessary to make clear that rationales such as those advanced by Judge Mikva and the Commission in this case—even if speculative—are plainly sufficient to sustain distinctions drawn by Congress.

I. THE COURT OF APPEALS MISAPPLIED THE STANDARDS SET FORTH BY THIS COURT IN FINDING CONGRESS' CLASSIFICATION NOT RATIONAL

In modern judicial history, it is rare indeed where a court has found an act of Congress unconstitutional on equal protection grounds where the challenged classifications do not involve protected classes or fundamental interests.[23] This Court has repeatedly explained that the standard for determining whether a distinction drawn by Congress is constitutional is "deferential":

> Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.[24]

Thus, a legislative distinction that does not burden a suspect class or a fundamental interest will be sustained "unless the varying treatment of different groups or persons is so unrelated so the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."[25] While the appellate court claimed to apply these principles, *see* Pet. App. at 33a, it is clear that it subjected the cable system

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[23] *See* Concurring Opinion of Mikva, C.J. at Pet. App. 39a.

[24] *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988).

[25] *Vance v. Bradley*, 440 U.S. 93, 99 (1979).

definition to a far more exacting level of scrutiny than those standards allow.

Under the tests articulated by this Court, the rationality of the common ownership distinctions between SMATVs embodied in the "cable system" definition cannot seriously be in doubt. First, "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. . . . Such action by a legislature is presumed to be valid."[26] The line Congress drew here, subjecting some SMATVs to its legislative scheme while exempting others, falls squarely within the "rough accommodation"[27] that legislatures are entitled to make. That the court of appeals could have conceived of a different place for distinguishing among SMATVs based solely on use of public rights-of-way, rather than based on ownership of the buildings served, does not make Congress' choice irrational.[28]

Rather, Congress' classification will be upheld under minimal equal protection scrutiny "if any state of facts reasonably may be conceived to justify it." *Sullivan v. Stroop*, —— U.S. ——, 110 S.Ct. 2499, 2504 (1990) (*quoting Bowen v. Gilliard*, 483 U.S. 587, 601 (1987)). The court clearly erred in applying this standard but holding that it could "conceive" of no basis for the dis-

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[26] *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (citation omitted) (upholding Massachusetts mandatory retirement statute). *See also City of New Orleans v. Dukes*, 427 U.S. at 303 ("rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations.")

[27] *Metropolis Theater Co. v. City of Chicago*, 228 U.S. 61, 69 (1913).

[28] *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("[t]he fact that the line might have been drawn differently

tinction drawn. Several such bases can be found—in the decades-old FCC definition upon which the Cable Act definition was based, in Judge Mikva's concurring opinion, and in the Commission's adoption of that opinion.

The differing treatment accorded by Congress makes sense, based on the Commission's experience with commonly owned SMATVs and its reluctance to treat them as cable systems. In 1977, the FCC explained in response to commenters urging parity of treatment between cable systems and master antenna television ("MATV")[29] systems (including those serving commonly owned buildings) that the "common ownership" requirement, among other things, limited the MATV provider to "several hundred subscribers within the four walls of a highrise facility, who generally are not paying separately for the

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at some point is a matter for legislative, rather than judicial, consideration.")

In fact, Congress' choice is consistent with FCC pre-Cable Act policy, which did not link its definition of cable system to use of the public rights-of-way at all. *See Notice of Proposed Rulemaking in Docket No. 20561*, 54 F.C.C.2d 824, 826 (1975) (noting that "planned and resort communities have been held to fall within our [cable television system] definition, despite the fact that they often operate on private land and utilize no public rights-of-way, and serve only residents of the private community rather than the general public."); *Citizens Development Corp.*, 52 F.C.C.2d 1135, 1137 (1975) (facility serving individual homes held to be a cable system, even where it "operate[d] on private property and serve[d] only residents of a private community and not the general public in the surrounding area."); *Bayhead Mobile Home Park*, 47 F.C.C.2d 763 (1974) (finding mobile home park to be cable system, even though located on privately-owned property).

[29] MATV systems predated satellite master antenna systems, but both are functionally equivalent in operation. Both serve subscribers in multiple dwelling units through use of a master antenna. *See generally N.Y. State Commission on Cable Television v. FCC*, 749 F.2d 804, 806 (D.C. Cir. 1984) (describing SMATV and MATV operations).

service."[30] It further reasoned that MATVs serving commonly owned multiple dwelling units were considered to be "not a competitive entry into something like cable television service but an almost necessary improvement to the business of leasing or selling dwellings."[31]

The FCC later clarified that

> in attempting to make [a distinction between regulated and unregulated facilities], we have focused on subscriber numbers as well as the multiple unit dwelling indicia on the theory that the very small are inefficient to regulate and can safely be ignored in terms of their potential for impact on broadcast service to the public and on multiple unit dwelling facilities on the theory that this effectively established certain maximum size limitations.[32]

Thus, SMATVs providing service to *non-commonly* owned buildings presumably were believed to fall more on the line of a "competitive entry" into cable television service, with the potential to serve a larger number of subscribers, than would be true for single building SMATVs or those serving commonly owned buildings.

The Commission has always considered facilities serving separately owned multiple dwelling units to be cable systems subject to its regulatory requirements. That Congress took this same approach in its new legislative scheme for cable regulation can hardly be considered "irrational." Further, it is hardly "inconceivable" that Congress also could have viewed a system that could wire any number of unrelated apartment complexes in a private development as more like a conventional cable system than an amenity provided by landlords to tenants. Or that Congress could have chosen common ownership of the buildings served as a rough surrogate for imposing

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[30] *Cable Television Systems*, 63 F.C.C.2d 956, 996 (1977).

[31] *Id.* at 997.

[32] *Cable Television System*, 67 F.C.C.2d 716, 726 (1978).

limits on the number of subscribers served by unregulated entities.

In refusing to credit these rationales, the court of appeals simply *disagreed* with Congress' determination that ownership, management and control of multiple dwelling units were at all relevant for determining whether a facility should be subject to regulation. But it is not the appellate court's province to overturn that judgment—nor does the fact that a line could be drawn at a different point make Congress' judgment "irrational."

The rationality of that approach is not undermined by the imposition of the mandatory franchising provision in the Cable Act. The appellate court apparently considered use of public rights-of-way as the sole justification for requiring a franchise, and thus found that imposition of a franchise requirement on one type of SMATV located on private property served no purpose in the Act.[33]

But as Judge Mikva pointed out, Congress intended to promote a wide range of consumer-interest and information-diversifying goals in the Cable Act, not all of which were tied to use of public rights-of-way.[34] These included establishing a national policy concerning cable communications; establishing franchise procedures and standards which encourage growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community; and assuring that "cable communications provide and are

[33] *See* Pet. App. 4a, 6a.

[34] In fact, entities other than SMATVs that do not use public rights-of-way would also be considered cable systems under the Act, including facilities providing cable service to private homes in a private development. *See Massachusetts Community Antenna Television Commission*, 2 FCC Rcd. 7321 (1987), *appeal dismissed sub nom., Channel One Systems, Inc. v. FCC*, 848 F.2d 1305 (D.C. Cir. 1988) (finding system serving a planned community which included single family dwellings is a cable system and not exempt from the Act, regardless of the use of public rights-of-way).

encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. Section 521. Congress easily could have determined that, for purposes of these policy interests, separately owned apartment complexes served by wire by a single SMATV operator should be treated as cable systems, even if public rights-of-way are not used, while systems serving only buildings under common ownership were less likely to share the attributes of—and require the same regulatory treatment as—conventional cable systems. Such a determination is hardly inconceivable, nor is it irrational.

To be sure, Congress did not articulate reasons in the Act or its legislative history for imposing differential treatment of SMATVs based on ownership of the buildings served. But that is not required. This Court has made clear that justifications for different treatment need not appear in the legislative or administrative record:

> Where . . . there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," . . . because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing.

United States R.R. Retirement Bd. v. Fritz, 449 U.S. at 179 (*quoting Flemming v. Nestor*, 463 U.S. at 612).[35] It is impossible to square the court of appeals' insistence that the FCC provide additional "legislative facts"—or

[35] *See also Exxon Corp. v. Eagerton*, 462 U.S. 176, 196 (1983) (under rational basis standard "a statute will be sustained if the legislature *could have reasonably concluded* that the challenged classification would promote a legitimate state purpose.") (emphasis supplied); *Sullivan v. Stroop*, —— U.S. ——, 110 S.Ct. at 2504 (a "statutory distinction does not violate the Equal Protection Clause 'if any state of facts reasonably *may be conceived* to justify it.'") (emphasis supplied) (*quoting Bowen v. Gilliard*, 483 U.S. 587, 601 (1987).

the court's rejection of Judge Mikva's proffered justifications as "naked intuition"—with the relaxed inquiry into legislative justifications that the rationality test entails.

Judge Mikva articulated several wholly "plausible reasons" for the legislative distinction at issue in this case. The FCC agreed that those were logical and likely reasons in responding to the appellate court's remand. Indeed, those reasons are firmly grounded in FCC precedent, in which the expert agency itself drew lines to distinguish between entities more like traditional cable systems and those that are mere "amenities" provided by a landlord to tenants. In failing to credit those reasons, the appellate court improperly overturned nearly three decades of Commission precedent and misapplied this Court's even longer held constitutional standards.

This legal error has practical consequences as well. By improperly substituting its judgment for that of Congress as to which entities should be regulated, the court of appeals upset a carefully balanced legislative and regulatory scheme. It freed from regulation entities that can serve relatively large groups of subscribers within a community. In so doing, contrary to the will of Congress, the court also opened up traditional cable systems to unfair competition by unregulated entities that operate in a manner virtually identical to those cable systems. All SMATVs that do not use public rights-of-way by wire—including those that have always been considered cable systems—are now free from the burdens imposed on traditional cable operators, such as the mandated provision of access channels for the use of others, payment of franchise fees to local authorities,[36] and complying with a wide

[36] *E.g.*, 47 U.S.C. Section 611 (allowing franchising authorities to establish requirements for channel capacity for public, educational, or governmental use); Section 612 (requiring cable operators to designate channel capacity for lease by others); Section 622 (payment by a cable operator of a franchise fee); Section 623 (allowing regulation of rates); Section 624 (regulation of services, facilities and equipment by franchisors).

range of FCC rules, such as those regarding program exclusivity, signal leakage, and technical standards.[37] The court of appeals' decision encourages unregulated "cream skimming" of desirable pockets of a community by unregulated entities, to the detriment of cable subscribers throughout the franchise area.[38] It creates an unequal scheme for the treatment of systems serving private housing developments and those serving municipalities, even where those private developments can cover substantial areas and include large numbers of separately owned apartment complexes.

It is to remedy this disruption of the legislative objectives of Congress as well as to clarify the proper scope of judicial review of Congressional line-drawing that this Court should review the decision below.

[37] *E.g.*, 47 C.F.R. Subpart F (requiring cable system nonduplication of network and syndicated programming contained in local broadcast signals); Subpart K (requiring cable system adherence to certain technical standards and signal leakage monitoring and reporting).

[38] For example, SMATV operators apparently have interpreted the court's decision to allow them unregulated entry into planned community developments, and to serve single family homes in new privately owned housing developments proliferating in areas such as Florida and California. *See Multichannel News*, "SMATVs Win Major Right-of-Way Suit on Appeal," June 15, 1992 at 16.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 28, 1992

CERTIFICATE OF SERVICE

I, Diane Burstein, hereby certify that three true copies of the foregoing Brief for Respondent National Cable Television Association in Support of Petition For A Writ of Certiorari were served this 28th day of October, 1992 by depositing true copies thereof with the United States Postal Service, first-class postage prepaid, addressed to:

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(4)

No. 92-603

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

BEACH COMMUNICATIONS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Cable Communications Policy Act of 1984, which prohibits the operation of a cable television system that has not been franchised by the relevant state or local governmental authority, exempts from the definition of a "cable system" a facility that serves "only subscribers in 1 or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities uses any public right-of-way." 47 U.S.C. §522(6). The question presented is whether the Court of Appeals was correct in holding that the cable system definition violates the equal protection provision of the Fifth Amendment by arbitrarily distinguishing between a facility which serves commonly owned or managed multiple unit dwellings, and a facility which serves separately owned and managed multiple unit dwellings.

LIST OF PARTIES AND RULE 29 CERTIFICATION

The parties are correctly identified in the petition for a writ of certiorari. Richey-Pacific Cablevision Ltd. is the parent of Respondent Pacific Cablevision. None of the other Respondent corporations have parent companies or non-wholly owned subsidiaries.

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SUMMARY OF ARGUMENT

This Court should deny the petition for a writ of certiorari which seeks review of the appellate court's correct determination that the equal protection component of the Fifth Amendment still applies to socio-economic legislation. The statute at issue defines the term "cable system" and requires a person providing video programming over such a system to obtain a franchise from the appropriate local governmental authority. The cable sys-

tem definition and the corresponding franchise requirement apply to traditional community-wide cable operators who install their facilities throughout the public streets. The cable system definition excludes facilities serving only multiple unit dwellings, as long as the facilities are installed wholly on private property. However, some facilities serving multiple unit dwellings and which are located wholly on private property fall within the cable system definition, because the dwellings served are not commonly owned or managed.

The primary justification offered for the discrimination between the latter two types of facilities is that Congress conceivably meant to impose local franchising on facilities which, because of the larger number of subscribers they purportedly serve, resemble traditional cable systems. Yet the statute does not refer to system size, and indisputably exempts from the local franchising requirement certain systems which are capable of serving an entire community regardless of the number of subscribers and regardless of whether the properties served are commonly owned. As the appellate court found in applying the proper rational basis standard set forth in this Court's precedents, the classification is not rationally related to a legitimate government purpose.

Moreover, both the appellate court and the relevant federal agency invited Congress to address the issue as part of a then-proposed revision of the statute involved. Despite its knowledge of the appellate court's partial invalidation of the cable system definition, Congress declined to take any steps in response thereto, signalling its acceptance of that determination, during its subsequent passage of an act that even increases local regulation of cable television systems.

Because the appellate court's invalidation of the statutory provision is in accordance with the mandate of the

Constitution and the intent of Congress, the petition should be denied.

ARGUMENT[1]

I.

THIS COURT NEED NOT GRANT REVIEW BECAUSE THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE CLASSIFICATION OF VIDEO DISTRIBUTION SYSTEMS FOR PURPOSES OF LOCAL FRANCHISING JURISDICTION LACKS ANY CONCEIVABLE RATIONAL BASIS.

Equal protection requires "that all persons similarly situated . . . be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Unequal treatment of a particular group is permitted only if members of that group "have distinguishing characteristics relevant to interests the [government] has the authority to implement . . . ." *Id.* at 441.

The court of appeals determined that Congress did *not* intend in Section 602(6) of the Cable Communications Policy Act of 1984 ("Cable Act"), 47 U.S.C. §522(6), to require a local franchise of video distribution systems which (1) use wire only within the interior of a single multiunit dwelling (a "wholly private system"); (2) use wire within the interior of more than one multiunit dwelling and to interconnect such dwellings from a single headend[2] *if* all such dwellings are commonly owned, managed, or controlled (also a "wholly private system"); or (3) use radio or infrared, instead of wire, to intercon-

[1] Respondents have not included a statement of the case because the facts and proceedings as described by Petitioners are sufficient. However, to the extent Petitioners included legal argument within their statement of the case, *e.g.*, Pet. at 2-3, Respondents have presented their opposing arguments herein.

[2] A "headend" is the origination point for the system's signal transmissions where satellite receive-only dishes and an antennae tower combine and process all local and distant programming signals for distribution.

nect a group of multiunit dwellings under separate ownership, management or control from a single headend (an "internal system"), unless the video distribution system uses a public right-of-way.

The court of appeals determined that Congress *did* intend in Section 602(6) of the Cable Act to require a local franchise of video distribution systems which use wire within the interior of more than one multiunit dwelling and to interconnect such dwellings from a single headend *if* such dwellings are separately owned, managed or controlled (an "external, quasi-private system"), even if no public right-of-way is used.

Unlike traditional cable television systems, none of the above-described facilities uses the public rights-of-way in order to deliver their video programming to subscribers. All of the above-described facilities use wire for at least that portion of their systems within the interior of multiunit dwellings. All serve groups of multiunit dwellings, both commonly-owned and managed and separately-owned and managed. The sole "distinguishing characteristic" is that some video distribution systems use wire to cross a private property boundary line to interconnect and serve separately owned or managed multiunit dwellings while others use radio or "wireless" transmissions.[3]

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[3]In effect, Congress has required external, quasi-private SMATV operators to obtain a franchise which permits them to install facilities in public rights-of-way which they do *not* seek to occupy, but which does *not* authorize them to serve the private property they *do* wish to occupy. The mere fact that a cable operator is armed with a franchise does not entitle the operator to occupy private property over the objection of the owner. In the absence of a cable mandatory access statute forcing a landowner to allow the installation of cable facilities on private property, a landowner has a constitutionally protected right to exclude a franchised cable operator. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This is yet another reason why the imposition of a franchising requirement upon external, quasi-private system defies common sense. *See infra* at 12-18.

This *same* "distinguishing characteristic," *i.e.*, using wire rather than wireless to interconnect buildings, is deemed irrelevant for franchising purposes, however, if the interconnected group of multiunit dwellings is under common ownership. Therefore, as between those systems which employ only wire, rather than a combination of wire and radio transmission, the sole distinguishing characteristic is the ownership of the buildings served.

The court of appeals concluded that the latter characteristic was a distinction without a difference, and held the discriminatory franchising requirement unconstitutional as a violation of the equal protection component of the Fifth Amendment. Having done so, the court of appeals did not reach the issue of whether the discriminatory classification as between wired and wireless technologies also abridged the equal protection guarantee.

A. Dual Federal-Local Jurisdiction Over Interstate Media Of Communications In General And Cable Television In Particular Has Been Historically Limited To Those Media Which Use Public Rights-Of-Way For Signal Transmission.

The discriminatory franchising requirement must be examined in light of the long-standing congressional and FCC policy preempting local jurisdiction and regulation of interstate communications media. The single exception to exclusive federal control over interstate media has been the adoption of shared federal-local jurisdiction whenever certain interstate media must make use of the public rights-of-way in order to deliver their services to the public. Of all the video distribution systems at issue here, only traditional cable television systems place physical facilities in public rights-of-way.

Through passage of the Communications Act of 1934, 47 U.S.C. §§151-712, Congress reserved to the federal

government broad and exclusive authority to regulate interstate communications. Exclusive jurisdiction was asserted over

> all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission . . . .

47 U.S.C. §152(a). Congress intended these "broad responsibilities" to encompass traditional cable television as well as other forms of interstate communications. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-178 (1968).

The FCC has for almost 50 years preempted local jurisdiction over interstate communications. *See, e.g., National Broadcasting Co. v. United States,* 319 U.S. 190 (1943). The FCC has specifically preempted local regulation of those aspects of cable television not linked to the physical use of public rights-of-way. *Capital Cities Cable Inc. v. Crisp,* 467 U.S. 691, 702 (1984); *Brookhaven Cable TV Inc. v. Kelly,* 573 F.2d 765 (2d Cir. 1978), *cert. denied,* 441 U.S. 904 (1979); *General Tel. Co. v. FCC,* 413 F.2d 390, 398 (D.C. Cir. 1968).

However, the FCC has permitted minimal local regulation of certain aspects of traditional cable television, thus creating a "deliberately structured dualism" of federal and local jurisdiction. *Cable Television Report and Order,* 36 F.C.C.2d 143, *recon.*, 36 F.C.C.2d 326 (1972), *pet. for review den'd sub nom. ACLU v. FCC,* 523 F.2d 1344 (9th Cir. 1975). The FCC premised the local authorities' regulatory jurisdiction *solely* on traditional cable's use of the public rights-of-way:

> . . . [I]t would be beneficial to clearly delineate those general aspects of cable regulation which we believe are in the province of this agency and those that are the responsibility of non-federal officials. The ultimate dividing line, as we see it, rests on the distinction between reasonable regulations regarding use of the streets and rights of way and the regulation of the operational aspects of cable communications. The former is clearly within the jurisdiction of the states and their political subdivisions. The latter, to the degree exercised, is within the jurisdiction of this Commission. This is so because of the interstate nature of the medium as enunciated by the Supreme Court.

In Re Amendment of Part 76 of the Commission's Rules, 54 F.C.C.2d 855, 861 (1975), *citing United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) and *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

As new applications of existing technology have brought forth alternative video distribution systems, the FCC has consistently recognized the use of public rights-of-way as being the only basis for local jurisdiction over interstate communications. The FCC preempted local franchising regulation of MDS[4] or "wireless" video distribution systems precisely because no facilities were installed in public rights-of-way. *In Re Orth-O-Vision, Inc.*, 69 F.C.C.2d 657 (1978), *recon. den'd*, 82 F.C.C.2d 179 (1980), *pet. for review den'd sub nom. New York State Commission on Cable Television v. FCC,* 669 F.2d 58 (2d Cir. 1982). (These are the systems referred to by the court of appeals as "internal" systems.)

Equally significant, just prior to passage of the Cable Act, the FCC preempted local franchising regulation of

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[4] "MDS," or multi-point distribution service, transmits satellite and television programming throughout a community via radio frequencies rather than cable.

SMATV[5] systems serving multiunit dwellings which do not use public rights-of-way. *In Re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983) (*"ESCOM"*), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) (*"NYSCCT"*).[6] The FCC rejected the argument that these SMATV systems should be subject to the same dual regulatory approach applicable to traditional cable, despite the similarity between the two industries with respect to their use of *wired* technology:

> . . . [T]he Commission established this duality [with respect to traditional franchised cable television] as a policy decision, rather than as a matter of law, *based on franchised cable's use of the public streets and rights-of-way and the particular local interests considered applicable to a cable operator, generally chosen to serve the community as a whole.*

95 F.C.C.2d at 1234 (emphasis added). The FCC reaffirmed the distinction it previously drew "between reasonable regulations regarding use of the public rights-of-way and the regulation of the operational aspects of cable communications," reserving to itself regulation of the latter and permitting local entry regulation only in regard to use of the public domain. *ESCOM*, 95 F.C.C.2d at 1235, citing *Orth-O-Vision*, 54 F.C.C.2d at 861.

The FCC refused to permit local jurisdiction over such SMATV systems because of the threat such regulation posed to the federal government's own statutory mandate

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[5]"SMATV," or satellite master antenna television, is a mini-cable facility serving a discrete property, such as an apartment building, the facilities of which are installed wholly on private property.

[6]Neither the FCC nor the D.C. Circuit reached the question as to whether preemption could extend so far as to embrace SMATV facilities serving separately-owned buildings.

to advance the entry and growth of diverse interstate communications media:

> State or local government regulatory control over, or interference with, a federally licensed or authorized interstate communications service, intentionally or incidentally resulting in the suppression of that service in order to advance a service favored by the state, is neither consistent with the Commission's goal of developing a nationwide scheme of telecommunications nor with the Supremacy Clause of the Constitution.

ESCOM, 95 F.C.C.2d at 1233. The FCC stated that a local franchising requirement "contradicts our efforts to create a more rapid and efficient interstate telecommunications marketplace." *Id.* at 1232.

Upon review of the *ESCOM* ruling, the D.C. Circuit emphasized the long-recognized distinction between video distribution facilities that use public rights-of-way and those that do not as the justification for excluding such SMATV systems from local franchising barriers:

> Petitioners contend that the Commission's refusal to give state and local governments the same amount of authority over SMATV as they have over traditional cable is a reversal of well-established policy. Careful review of Commission precedent, however, reveals that the petitioner's argument ignores the critical distinction the Commission has made between cable television systems that use public rights-of-way and systems, like SMATV, that are operated solely on private property.

NYSCCT, 749 F.2d at 808-09. The D.C. Circuit then reviewed the relevant precedent regarding the "dual regulatory framework" under which "the Commission has consistently retained exclusive authority over those elements of cable television that do not involve the use of public rights-of-way." *Id.* at 810.

Moreover, the petitioners in the *NYSCCT* case argued that the preemption of local franchising over MDS systems had no relevance to the FCC's decision to preempt local franchising over SMATV systems because of the technological differences between MDS, a "wireless" technology, and SMATV or traditional franchised cable, "wired" technologies. The D.C. Circuit rejected that contention by focusing on the "one critical" distinction between MDS and traditional franchised cable: MDS "is operated solely on private property and makes no use of public rights-of-way." *Id.* The D.C. Circuit found *no* pertinent distinction between MDS and SMATV, since both are operated wholly on private property, and in effect found that preemption of the former required preemption of the latter: "The Commission's preemption of [MDS], which, like the system involved in this appeal, does not use public rights-of-way, plainly refutes [the] contention that the Commission has arbitrarily reversed well-established policy." *NYSCCT,* 749 F.2d at 811. The exercise of exclusive federal jurisdiction turned not on the type of technology involved, *i.e.*, wired versus wireless, nor on the particular ownership or management of the building served, but rather on the non-use of public rights-of-way.

In enacting the Cable Act, Congress repeatedly referenced traditional cable's use of the public rights-of-way as the sole nexus for permitting any degree of local regulatory jurisdiction over an interstate medium of communications. The Senate Report quoted the FCC in concluding that the "ultimate dividing line" between federal and local jurisdiction "rests on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications." S.Rep. No. 67, 98th Cong., 1st Sess. 7 (1983), *quoting In Re Amendment of*

Part 76 of the Commission's Rules, 54 F.C.C.2d at 861. "The premise for the exercise of . . . local jurisdiction continues to be its use of local streets and rights of way." S.Rep. at 7.

The floor statements of individual members echo these conclusions. Senator Hollings, the ranking minority member of the Senate Commerce Committee, which oversaw the bill, stated, in the floor debate: "No one can doubt that localities should be able to exert some control over cable because it crosses public rights of way." 84 Cong. Rec. S8320 (daily ed. June 14, 1983). Senator Packwood, the Committee's chairman observed:

> Traditionally, the position of this country has been that local governments have no right to regulate communications. Cable is a form of communications. But for the sole reason that they have to string a wire, the Federal Government initially made a decision that they could regulate cable.

84 Cong. Rec. at S8314 (daily ed. June 14, 1983). And the House Report stated that a facility serving multiple unit dwellings was exempt from local franchising, unless "such facility or facilities use a public right-of-way," H. Rep. No. 934, 98th Cong., 2d Sess. 44 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, without regard to commonality of property ownership.

Thus, the distinguishing characteristic historically underpinning local jurisdictional control over interstate communications media has not been whether the particular technology employed was predominantly "wired" or "wireless", or the ownership or management of the buildings served by the communications medium, but rather whether use of the public rights-of-way was essential to the delivery of video services to the public, *i.e.*, the public versus private property distinction. Since this traditional demarcation point for exclusive federal jurisdiction versus shared federal-local jurisdiction is absent in

the instant case, the question becomes what other rational justification conceivably exists for subjecting those systems interconnecting separately-owned multiunit dwellings via wired technology to a franchising requirement that would not also justify imposing a franchising requirement upon (1) those systems interconnecting commonly-owned multiunit dwellings via wired technology and (2) those systems interconnecting separately-owned multiunit dwellings via wireless technology. Congress was, however, crystal-clear that video distribution systems falling within these latter two classifications could operate free of local jurisdictional interference.

B. The Justifications For The Discriminatory Classification As Proferred By Chief Judge Mikva And Urged Upon This Court By Petitioners Are Not Plausible And Defy Common Sense.

Petitioners posit that the "justifications conceived by Chief Judge Mikva fall well within the range of 'rough accommodations' [citation omitted] that the democratic process is entitled to make under rationality review." Pet. at 10-11. Specifically, Petitioners advance a single argument in support of Congress' discriminatory franchising requirement as between SMATV operators serving commonly-owned versus separately-owned buildings:

> First, it stands to reason that in contrast with facilities serving separately owned units, a requirement of common ownership, control, or management imposes a relative constraint upon the size of the market being served by the relevant SMATV facilities. The constraint on size gives each consumer of cable services greater leverage over the product supplied. Second, that leverage is likely to be enhanced by the fact that all of the consumers will be able to use their status as unit owners or tenants to bring common pressure to bear on a single set of owners or managers who provide or purchase all of a facility's service.

Pet. at 13-14. In short, Petitioners claim that the larger the video distribution system is, the greater is the need for local government regulation to insure that consumers are protected.

Respondents disagree that the above rationale "stands to reason". First, the commonly owned, managed or controlled requirement does *not* impose *any* "constraint upon the size of the market being served by the relevant SMATV facilities." If an SMATV operator wishes to serve separately-owned multiunit buildings and is denied the prerequisite local franchise, for example, the SMATV operator need only install a separate satellite headend facility on each of the separately-owned private properties sought to be served. In this manner, the actual size of the cable market being served by a single SMATV operator is no different than the size of the market which that same SMATV operator could serve if it were able to interconnect those same separately-owned buildings to a single headend via a piece of cable instead.

Thus, all the discriminatory franchising requirement imposes is a financial disincentive upon those SMATV operators who wish to serve separately-owned buildings *at the request of the building owner;* it does not prevent such buildings from being served by a single "multidish" operator. The "practical effect" of the discriminatory classification is to escalate the cost of serving separately-owned buildings, from the minor cost of a length of interconnecting cable strand to the major cost of an entire duplicative satellite headend facility to be installed a bare backyard or rooftop away from the first satellite headend facility. *See United States Dep't of Agriculture v. Moreno,* 413 U.S. 528, 537 (1973) (overturning on equal protection grounds a legislative classification the practical effect of which did not operate rationally to further stated governmental interest because the classification could be avoided by those whom the government intended

to exclude from benefits by the classification). Indeed, given the practical effect, the forced expenditure of funds to enter the market through multidish installation rather than through a mere cable interconnection becomes tantamount to a punishment for choosing the SMATV business rather than the MDS business. *See James v. Strange*, 407 U.S. 128, 141-42 (1972) (while statute may "betoken legitimate state interests", "interests are not thwarted by requiring more even treatment" of similarly-situated persons where effect of statute "embodies elements of punitiveness").[7]

If, as Petitioners claim, Congress intended to protect consumer welfare by restricting the size of the video distribution systems that could serve consumers free of local government *entry* regulation, the means chosen by Congress to ensure that larger systems do not escape regulation defy common sense.[8] To maintain that Congress acted rationally to attempt to constrain the size of SMATV systems not subject to local regulatory oversight by imposing the financial hardship of such "multidish" entry, rather than simply legislating that no SMATV operator may serve more than "x" number of subscribers without a franchise, is itself irrational.[9]

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[7] Rather than placing burdens on the development of SMATV, Congress meant to eliminate obstacles to the development of competition to the established franchised cable industry. Thus, the House Report voiced congressional support of

> the growth and development of alternative delivery systems for [video] services, such as DBS, SMATV and subscription television. The public interest is served by this competition, and it should continue.

H. Rep. at 22-23.

[8] For example, the statute would permit a video provider without a franchise to serve adjoining apartment buildings owned by a single landlord. But if the landlord sold one of the buildings, video service must cease. This result does not serve any consumer interest.

[9] Congress knows how to tailor legislation to the size of the cable facility. For example, the Cable Act exempts cable systems serving "fewer than 50 subscribers" from the Act's equal employment opportunity provisions. 47 U.S.C. §554(h)(2). Similarly, the FCC is required to adopt regulations specifically for "cable systems that have 1,000 or fewer subscribers" under newly-enacted 47 U.S.C. §543(i). *See* H.R. Cong. Rep. No. 102-862, 102d Cong. Sess. 12 (1992).

Second, the absence of *local entry* regulation does not leave consumers bereft of regulatory protection regardless of "system size"; the FCC can regulate all of the interstate communications media at issue here. Indeed, the very basis for the FCC's preemption of local jurisdiction over SMATV and MDS facilities in the *ESCOM* and *Orth-O-Vision* decisions was the FCC's conclusion that such local entry regulation was *counter* to consumer welfare. *See ESCOM*, 95 F.C.C.2d at 1232 ("preemption . . . will ensure continued development and increased programming diversity to viewers of SMATV"); *accord, Orth-O-Vision*, 69 F.C.C.2d at 669. Accordingly, Chief Judge Mikva's proffered "consumer-interest and diversity-of-information rationales", App. at 43a, for local jurisdiction are contradicted by the very FCC precedent exempting such systems from local jurisdiction.

Third, Petitioners studiously avoid any discussion of what rational basis Congress would have had for imposing local regulation upon SMATV systems of a "larger size", while exempting all MDS systems from such local regulation no matter what their size. Petitioners concede that many SMATV operators interconnecting commonly-owned multiunit dwellings will serve more subscribers than their SMATV counterparts interconnecting separately-owned multiunit dwellings. Pet. at 14, n.11. As set forth directly above, the SMATV operator in a particular locality interconnecting commonly-owned buildings is more likely than not to be the *same SMATV operator* who has simply been forced to install multiple dishes to serve separately-owned buildings since interconnection by wire would trigger the franchising requirement. In contrast, MDS operators will always be larger than

SMATV operators since omnidirectional wireless technology enables such operators to reach every single resident in the *entire* municipality from a single transmission point as long as line-of-sight barriers do not interfere.

If, as Petitioners urge, the legitimate governmental interest sought to be achieved by the discriminatory classification is to protect consumers by subjecting video distribution systems having a "larger subscriber base" to local regulation, it makes no sense that Congress did not also seek to restrict the market size of locally unregulated "wireless" operators or simply subject all video distribution systems, wired or wireless, over a certain size to the franchising requirement. Surely, Petitioners do not mean to argue that consumers of video services distributed by wireless technology are less deserving of local regulatory "protection" than consumers of wired technology.

The court of appeals' rejection of the "system size" justification makes eminent good sense. If any of the video distribution systems are "similar" to traditional cable systems on the basis of this "system size" characteristic, it is MDS or wireless systems, not SMATV systems.[10]

[10] Petitioners argue that Chief Judge Mikva's supposition that cable facilities serving commonly owned buildings are "less in need of regulation" is "implicit in the FCC's consistent pre-Cable Act policy . . . ." Pet. at 13, n.10. This argument is both incorrect and irrelevant. It is incorrect because the prior FCC rulemakings cited by Petitioners simply do not state that their purpose was to create an exemption from regulation based on the size of the facility. That is a *post hoc* rationalization, conceived by Chief Judge Mikva, that finds no support in the texts of the earlier Commission decisions. Even if that rationalization is imposed retroactively on the older cases, the unconstitutionality remains because, as shown above, the purported interest in imposing local regulation on larger cable facilities is not furthered by the distinction among facilities drawn by the statute at issue. At best, Petitioners can rely on the prior FCC cases only to make the irrelevant argument that the regulation found by the D.C. Circuit to be unconstitutional has been unconstitutional for many years.

While the justification proffered by Chief Judge Mikva for why wired, but not wireless, facilities serving separately-owned buildings need obtain a local franchise was only mentioned and not discussed by Petitioners,[11] Respondents feel compelled to address the contradiction which that justification poses to both Congress' and the FCC's own stated policies. Although the majority could conceive of no rational basis for this distinction, App. at 34a, Judge Mikva opined that Congress simply could have intended to "encourage[ ] SMATV operators to use radio-wave technology instead of cable wiring," and that such a policy choice by Congress does not give rise to an equal protection challenge. App. at 42a.

This justification flies in the face of "certain basic facts" that have dictated decades of congressional and administrative policy with respect to communications, foremost of which is that "the radio spectrum simply is not large enough to accommodate everybody." *National Broadcasting Co. v. United States,* 319 U.S. 190, 213 (1943). As this Court repeatedly has held, it is the scarcity of radio frequencies that justifies extensive federal regulation of the airwaves, notwithstanding the obvious constitutional concerns that shadow any regulation of speech-related activities. *Id.* at 210-16; *Red Lion Broadcasting v. FCC,* 395 U.S. 367, 375-77, 386-90 (1969). Because of spectrum scarcity, Congress has directed the FCC to allocate frequencies in an "efficient" manner, 47 U.S.C. §307(b), and to "encourage . . . more effective use of radio . . . ." 47 U.S.C. §303(h).

Nevertheless, at this point "virtually all of the usable spectrum already is allocated to specific services, and

[11] Petitioners note that the court of appeals did not need to reach the constitutionality of the distinction between wired and wireless facilities interconnecting separately-owned buildings given its ruling overturning the distinction drawn between SMATV facilities on the basis of the ownership of the property served. Pet. at 13, n.9.

Judge Mikva dissented for the reasons stated in his previous concurrence. *Id.* at 7a.

SUMMARY OF ARGUMENT

The decision of the court of appeals is incorrect for at lease two related reasons. First, to the extent that the court rejected "conceivable" justifications for the distinction as lacking support in the legislative history or administrative record, it engaged in too grudging an application of the rational-basis test. It is well established that a rational basis, otherwise sufficient to support legislation, need not be articulated or even considered by the legislature. *See, e.g., Nordlinger v. Hahn*, 112 S. Ct. 2326, 2334 (1992). Nor is there any authority for requiring administrative development of the facts justifying the legislature's decision.

Second, to the extent that the court of appeals thought the asserted justifications themselves to be irrational, it too readily imposed its own judgments, rather than deferring to the wisdom of Congress. If Congress believed that different types of SMATVs stand on a different footing, then a federal court should not override that belief unless the facts plainly show that no difference exists. Here, the likelihood that SMATVs serving buildings under common ownership will be smaller and more responsive to consumers is enough to sustain the statute, under proper application of the rational-basis test.

Finally, we note that the new line imposed by the court of appeals—exempting all SMATVs from local regulation while requiring such regulation for all conventional cable systems—is at least as problematic as the line originally drawn by Congress. This new rule creates a potential for serious competitive inequities between similar providers

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5a-6a. The court did not ultimately address the second distinction discussed in its previous opinion—between wired systems serving separately owned and controlled dwellings and systems relying on wireless technology to interconnect such dwellings. *Id.* at 3a-4a.

of cable services. That potential is a further illustration of the reasons for allowing legislators to determine the precise scope of economic regulations.

ARGUMENT

This case, as it stands before the Court, involves a narrow, specific question: whether, under the rational-basis standard of the equal protection clause, it was rational for Congress to require SMATVs serving multiple-unit dwellings under separate ownership and management to get local franchises even though SMATVs serving similar dwellings under common ownership or management need not. The court of appeals held that there was no reasonable basis for treating the SMATVs differently, solely because of the nature of the ownership and management of the buildings involved. This ruling was erroneous both because the court incorrectly required a showing of rationality in the administrative record and because the court disregarded conceivable, reasonable justifications for the line drawn by Congress.

I. A STATUTE MAY BE UPHELD AS RESTING UPON A CONCEIVABLE RATIONAL BASIS EVEN IF THE BASIS IS NOT DISCUSSED IN THE LEGISLATIVE HISTORY OR IN AN ADMINISTRATIVE RECORD.

The basic standard for judging statutory classifications under the equal protection clause requires little discussion. A legislative distinction that does not burden a suspect class or a fundamental interest will be sustained "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *see Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450, 457-58 (1988); *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). As

this Court has observed, this standard means that a classification will be upheld "'if any state of facts reasonably may be conceived to justify it.'" *Sullivan v. Stroop*, 110 S. Ct. 2499, 2504 (1990) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 601 (1987)).

The court of appeals appeared to accept this standard in theory—equivocally in its first opinion (Pet. App. 35a), more definitely in its second opinion (*id.* at 4a)—but not in practice. Thus, although Judge Mikva offered justifications for the distinctions made in the statutory scheme, the court said that it found no rational basis for them "[o]n the record before us." *Id.* at 34a. It then remanded for the presentation of additional "legislative facts." *Id.* at 36a. After the report by the FCC offered no new legislative facts—resting instead on the justifications previously advanced by Judge Mikva—the court discounted those justifications as a "mere impression" or "intuition," which the Commission, despite the prior invitation, had "failed to flesh . . . out." *Id.* at 4a.

This approach demands too much. Although it is true that Congress did not explain its classifications along the lines suggested by Judge Mikva, it was not required to do so. Only last Term, this Court again made clear that "the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 112 S. Ct. at 2334; *see United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Flemming v. Nestor*, 363 U.S. 603, 612 (1960). Moreover, if the rationality of a legislative distinction depends on particular facts, those facts need not be proved in court. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). Rather, it is up to those challenging the statute to "'convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" *Ibid.* (quoting *Vance v. Bradley*, 440 U.S. at 111).

It would be extraordinary, in fact, to have any different rule—in essence requiring Congress (or, perhaps, an implementing agency) to "make a record" in support of each statutory classification. Any piece of complex economic legislation is likely to involve a "process of line-drawing," *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 179, and that process is not lightly to be second-guessed. As this Court has stated, "[s]ocial and economic legislation like the statute at issue in this case . . . 'carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.'" *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. at 462 (quoting *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981)). It is enough, therefore, "that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant government decisionmaker." *Nordlinger v. Hahn*, 112 S. Ct. at 2334 (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-29 (1959)). That purpose "may be ascertained even when the legislative or administrative history is silent." *Ibid.* (citing *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969)).

The court of appeals thus erred in rejecting possible justifications for the statute because they were not grounded in "the record" before it (Pet. App. 34a) or "flesh[ed] . . . out" by the Commission (*id.* at 4a). Once Judge Mikva had advanced possible grounds for the statutory distinction, and certainly once the Commission had endorsed them after remand, the court should have addressed them squarely and, if convinced that they were irrational, explained its reasons for thinking so. To strike down a federal statute without undertaking that necessary analysis is an improper application of the rational-basis test established by this Court.

II. THE JUSTIFICATIONS ADVANCED BY JUDGE MIKVA, AND ENDORSED BY THE COMMISSION, ARE ADEQUATE TO SUSTAIN THE STATUTE UNDER THE RATIONAL-BASIS TEST.

It is not enough, of course, that the purpose of a statutory classification be "conceivable"; it must also be "rationally related to a legitimate state interest." *City of New Orleans v. Dukes*, 427 U.S. at 303. The distinction here—between different classes of SMATVs—meets that standard.

The court of appeals appeared unable to appreciate the differences between SMATVs serving dwellings under separate ownership and SMATVs serving dwellings under common ownership because it was struck by one similarity between them: neither system uses public rights-of-way. But, for purposes of the rational-basis inquiry,[5] that is only the beginning of the analysis. Even though two classes of SMATVs may be identical in one respect, they may differ in other material respects. And it is upon those differences that the legitimacy of the statutory classification will ultimately depend.

It is to that question that Judge Mikva turned his attention. And, in his initial opinion, he articulated fully conceivable, rational reasons why, regardless of use of rights-of-way, Congress could have decided to exempt from regulation only SMATVs serving commonly owned or managed buildings. He noted the reasonable and accurate proposition "that a SMATV system serving multiple buildings not under common ownership is similar to a traditional cable system and likely to give rise to similar problems from the perspective of the viewer." Pet.

[5] The fact that a business like respondents' does not use public rights-of-way may or may not be relevant to its First Amendment or other arguments. But the precise question here is simply whether there are differences between the favored class (SMATVs serving commonly owned dwellings) and the disfavored class (SMATVs serving separately owned dwellings) that support the distinction.

App. 42a-43. In contrast, Congress might reasonably have thought "that a SMATV facility serving buildings under common ownership is likely to be smaller, and the ability of the residents to influence ownership likely to be greater, so that the costs of regulation could outweigh the benefits." *Id.* at 43a.[6] In the latter case, after all, the leverage exercised by consumers would be enhanced not only because of the relatively small scale of the SMATV but for another reason as well: unit owners or tenants would have an existing, broader economic relationship with the single building manager or owner controlling the SMATV. It follows that Congress could rationally conclude that it was appropriate to have local governments regulate the first class of SMATVs, but not the second.[7]

It may well be that *some* SMATVs serving commonly owned dwellings will be larger, and thus in theory less responsive to consumers, than *some* SMATVs serving separately owned dwellings. But that possibility does not mean that it was irrational for Congress to believe that, in general, the reverse will be true. A law remains constitutional even if it "only partially ameliorate[s] a perceived evil and defer[s] complete elimination of the evil to future regulations." *City of New Orleans v. Dukes*, 427 U.S. at 303 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955)). Moreover, "rational distinctions may be made with substantially less than mathematical exactitude." *Ibid. See Burlington N.R.R. v. Ford*, 112 S. Ct. 2184, 2187 (1992); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976).

[6] *See* 47 U.S.C. § 521(6) (expressing a legislative goal of "minimiz[ing] unnecessary regulation that would impose an undue economic burden on cable systems").

[7] Absent this requirement, the only limitation on future development of exempted SMATVs would be the number of existing private residential communities (comprised of independently owned and managed buildings) that could be wired together without use of public rights-of-way.

The choice made here by Congress is not only rational but supported by a lengthy history of FCC regulation in the cable field. For many years prior to the enactment of the Cable Act, the FCC exempted from regulation those "master antenna television systems" ("MATVs") that served buildings under common ownership or management. *See* Pet. App. 12a-13a; *In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations with Respect to the Definition of a Cable Television System and the Creation of Classes of Cable Systems*, 63 F.C.C.2d 956 (1977); *id.*, 67 F.C.C.2d 716 (1978).[8] It did so on the express theory that the exempted systems would be small enough that they would not require the types of regulation applicable to cable systems. *Id.* at 726. This distincton was later carried forward to SMATVs, after satellite technology had come into operation and expanded the number of channels that a MATV system could provide. *See* Pet. App. 13a; *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 807 n.1 (D.C. Cir. 1984); *In re Cable Dallas, Inc.*, 93 F.C.C.2d 20, 21 (1983).

It was thus hardly surprising that, in deciding what cable franchising requirements to impose in the 1984 Cable Act, Congress followed the FCC's lead in determining whether particular types of systems are sufficiently similar to conventional cable systems to justify regulation. Like the FCC, Congress was faced with a range of potential subjects of regulation, ranging from single-building master antenna systems up to large municipal cable systems. Systems that interconnect independently owned buildings without using rights-of-way occupy an intermediate position in this range. Like traditional cable systems, they may provide video programming to whole communities of independently owned

[8] MATVs differ from SMATVs only because the latter use satellite dishes to pick up and distribute additional channels such as HBO or ESPN.

residential buildings; yet, unlike traditional cable systems, they do not use public rights-of-way. In view of the intermediate status of these systems, it is difficult to say that Congress violated the rational-basis standard when it chose to put them on one side of the regulatory line rather than the other.

In any event, if the court of appeals had good reasons for saying that the explanations offered by Judge Mikva were inadequate, it never said what those reasons were. To the contrary, Judge Mikva's explanations were never specifically addressed by the majority at all. Thus, while the majority noted that "putative justifications" had been offered, and had been endorsed by the FCC in the initial remand, it simply declared that they constituted nothing more than an "impression of 'similarity'" between conventional cable systems and non-exempted SMATVs. Pet. App. 4a. It then rejected this impression as a "naked intuition, unsupported by conceivable facts or policies," largely because the justifications had not been "flesh[ed] . . . out" by the FCC. *Ibid.*

This out-of-hand dismissal, however, gets matters backwards. Insofar as Judge Mikva (and the FCC) had put forward a "conceivable" basis for the classification, the court was obliged to address that basis on its merits. But the majority below acted as if it were reviewing some sort of independent administrative determination by the Commission (which, after all, was merely following the plain intent of Congress in the Act)—requiring the development of a sufficient factual record to satisfy the court of the determination's rationality. There was no reason to require the FCC to do anything to develop "legislative facts" supporting Congress's prior determination. Nor was the court correct in demanding that *it* be "convinced" of the factual basis of the justifications. Its sole proper role was to determine whether *Congress* could reasonably have believed the relevant facts to be true. By that standard, the statute clearly passes constitutional muster.

III. THE BROADER EXEMPTION MANDATED BY THE COURT OF APPEALS WILL CREATE COMPETITIVE INEQUITIES.

The irony of this case is that the distinction mandated by the D.C. Circuit—requiring franchising of all conventional cable systems but exempting systems that interconnect independently owned buildings in private communities—is at least as problematic as the line originally drawn by Congress. Under the decision below, cable systems will continue to be subject to extensive local regulation, but systems that are substantially similar (because they interconnect entire communities of independently owned and operated residential buildings) will not. The latter systems will be free to compete with franchised cable systems without incurring any obligation to offer services in other areas or subjecting themselves to any requirements concerning the types of programming and services that they must offer. They will be exempt from franchise fees and from the other duties imposed by the Cable Act and franchising officials.

Viewed in light of the policies espoused by Congress, as well as those reflected in the First Amendment, this state of affairs is highly questionable.[9] To the extent that the judicially expanded exemption makes it difficult or impossible for franchised cable systems to compete in private communities served by SMATVs, residents in those communities may be left with only one option—a system that may be less responsive to their needs and

[9] As discussed above, the Court is not here presented with respondents' claims that the distinction drawn by Congress violates the First Amendment or requires heightened equal-protection scrutiny. We note, however, that NCTA agrees with respondents that differential regulation of First Amendment "speakers" can sometimes raise First Amendment concerns. Our point here is that the new line mandated by the court of appeals is *more* problematic in this regard, because it produces differential treatment of two types of video-delivery systems that directly compete. A narrower exemption for SMATVs in commonly owned or operated buildings creates fewer constitutional concerns.

that is not subject to any regulation of its services by local franchising authorities. Franchised cable systems, in turn, will continue to be required to submit to regulatory requirements, without having an equal opportunity to obtain customers in areas that will tend to be highly desirable as a commercial matter.

The problematic nature of the line mandated by the court of appeals thus illustrates well the wisdom of leaving that determination to Congress, rather than the courts. *See Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (this Court has "returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws"). Absent some reason for concern that a particular line drawn by Congress was chosen for "suspect" reasons or interferes unduly with the exercise of constitutional rights, intrusive judicial review is just as likely to impede implementation of rational social and economic policy as it is to promote it. Here, it made no sense for a court to decide to maintain a costly regulatory system applicable to one type of cable operator, while exempting direct competitors that Congress expressly, and for rational reasons, sought to bring under that system.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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No. 92-603

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

BEACH COMMUNICATIONS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS BEACH COMMUNICATIONS, INC., MAXTEL LIMITED PARTNERSHIP, PACIFIC CABLEVISION, and WESTERN CABLE COMMUNICATIONS, INC.

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QUESTION PRESENTED

The Cable Communications Policy Act of 1984, which prohibits the operation of a cable television system that has not been franchised by the relevant state or local governmental authority, exempts from the definition of a "cable system" a facility that serves "only subscribers in 1 or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities uses any public right-of-way." 47 U.S.C. §522(6). The question presented is whether the Court of Appeals was correct in holding that the cable system definition violates the equal protection provision of the Fifth Amendment by artitrarily distinguishing between a facility which serves commonly owned or operated multiple unit dwellings, and a facility which serves separately owned and operated multiple unit dwellings.

LIST OF PARTIES AND RULE 29 CERTIFICATION

The parties are correctly identified in the Brief For The Petitioners. Richey-Pacific Cablevision Ltd. is the parent of Respondent Pacific Cablevision. Respondents MaxTel Limited Partnership, Beach Communications, Inc., and Western Cable Communications, Inc. have no parent companies or non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

Section 602(6) of the Cable Communications Policy Act of 1984 ("1984 Act"), 47 U.S.C. §522(6)(1988),[1] states:

> [T]he term "cable system" means a facility, . . . that is designed to provide video programming to multiple subscribers within a community, but such term does not include . . . (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way . . . .

Congress borrowed much of the language of the cable system definition from rules previously adopted by the Federal Communications Commission ("FCC"). *See* 47 C.F.R. §76.5(a)(1984).[2] Under the FCC's rules, systems meeting the cable system definition were nevertheless exempted from regulation if they served fewer than 50 subscribers. However, Congress rejected this "system size" provision as a means for imposing or exempting regulation under the 1984 Act.

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[1] Like the Government, we (1) refer to the relevant provision as subsection (6), although it now has been renumbered as subsection (7) following enactment of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Act"), and (2) use the terms "commonly-owned" and "separately-owned" to encompass the full distinction based on "common ownership, control, or management".

[2] Congress' adoption of the FCC language is curious given the difference between FCC and congressional policy. For example, the FCC defined cable systems for the purpose of imposing *federal* regulations originally aimed at protecting television broadcasters from the threat posed by cable systems. *First Report & Order in Docket Nos. 14895 & 15233*, 38 F.C.C. 683 (1965). Congress' 1984 cable system definition largely imposes *local* regulation on those falling within its scope. *See* 47 U.S.C. §541(b)(1) (prohibiting operation of a cable system except pursuant to a franchise issued by the state or local franchising authority).

In contrast, Congress retained the FCC's exemption from the cable system definition for systems that served "only subscribers in one or more multiple unit dwellings under common ownership, control, or management." *Id.* The FCC originally had used this "common ownership" language to exempt "MATV" systems from federal regulation. MATV systems consist of a single roof-top antenna which receives over-the-air broadcast signals for retransmission over wires to all of the units in the multiunit buildings. Pet. App. at 12a.

Congress adopted this exemption to release satellite master antenna television ("SMATV") systems from regulatory treatment as a cable system. Congress' action followed FCC preemption of local jurisdiction over SMATV facilities covered by the "commonly-owned" exemption. *In Re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983) ("*ESCOM*"). A SMATV system uses antennas which receive both over-the-air *and* satellite-transmitted signals for distribution over wire to the residents of one or more multiunit dwellings. Pet. App. at 11a. SMATV systems usually are located wholly on the private property adjoining the buildings served. *Id.* Respondents own and operate SMATV systems. Pet. App. at 18a, n.6.

Immediately post-passage of the 1984 Act, the FCC concluded that a SMATV facility that serves only multiunit dwellings is exempt from the cable system definition as long as the facility uses no public rights-of-way. *In re Amendment Of Parts 1, 63 and 76 Of The Commission's Rules*, 104 F.C.C.2d 386, 397 (1986) *modifying* 58 Rad.-Reg.2d (P&F) 1 (1985), *aff'd in part, rev'd in part sub nom. ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). Other multichannel video distributors that make no use of the public rights-of-way, and hence also are excluded from the cable system definition, include systems in the multichannel multipoint distribution service ("MMDS")[3] and direct broadcast satellite service ("DBS").[4] J.A. at 8-11. In reliance on this decision, Respondents interconnected by wire groups of multiunit dwellings such that a single SMATV system served all of the buildings, regardless of whether the buildings were commonly or separately owned. Pet. App. at 18a, n.6.

In the rulemaking now on review, the FCC partially reversed itself and determined that the cable system definition includes only those facilities which use cable, or some other physical medium, J.A. at 9-11, located *exterior* to the building(s) being served. J.A. at 18. A SMATV system using cable to interconnect two or more buildings uses exterior cable and therefore constitutes a cable system, according to the FCC, unless it qualifies for the "private cable exemption" set forth in §602(6)(B) of the 1984 Act. J.A. at 13. A SMATV system qualifies for the exemption only if all of the buildings interconnected by wire are commonly owned, controlled, or managed, and the SMATV facility uses no public rights-of-way. J.A. at 20. In contrast, MMDS and DBS remained exempt from the cable system definition regardless of the ownership characteristics of the buildings interconnected via wireless technology, or the number of subscribers served. J.A. 6-13.

Given the impact of the transformation of their facilities from non-cable systems to cable systems, Respondents filed a Petition For Review on the grounds, *inter alia*, that the regulatory distinction between SMATV systems using wire to interconnect *commonly* owned buildings as opposed to *separately* owned buildings violated the Equal Protection Component of the Fifth Amendment.

[3] MMDS receives satellite and broadcast video signals at a common receive point, and then uses microwave technology to redistribute the signals over radio frequencies from a central transmitter to any number of receive sites equipped with microwave antennas. Pet. App. 13a.

[4] DBS transmits video programming from an orbiting satellite directly to an antenna installed at the video consumer's residence.

The United States Court of Appeals for the District of Columbia Circuit, applying the rational basis standard of review, tentatively agreed. Pet. App. at 32a. All three members of the panel, however, deemed it appropriate to remand the record to the FCC for the development of "legislative facts" to support the classification. Pet. App. at 35a - 36a; Pet. App. at 44a-45a (Mikva, C.J., concurring).

In its Report to the court, the FCC suggested that Congress imposed regulations on SMATV systems using wire to interconnect separately-owned, but not commonly-owned, buildings as a means of regulating larger systems. Pet. App. at 50a. Deciding that this did not amount to a "reasoned justification in terms of *some* public purpose," Pet. App. at 4a, the court held the cable system definition unconstitutional to the extent it required SMATV operators to obtain a franchise before interconnecting separately-owned multiunit dwellings by wire. Pet. App. at 6a.

The court invited Congress to remedy the result if necessary, Pet. App. at 6a-7a, but in the course of a substantial revision of federal cable regulation, Congress declined to do so.[5] On November 30, 1992, this Court granted the Petition For Writ of Certiorari. J.A. at 44.

SUMMARY OF THE ARGUMENT

Since passage of the 1992 Act, current congressional intent coincides with Respondents' contention and the FCC's express preference that SMATV facilities operating wholly on private property interconnecting separately-owned multiunit dwellings by wire are not cable systems. Congress declined the court of appeals' invitation to

[5]The 1992 Act places substantial new burdens on cable systems, thus exacerbating the discriminatory effect of the cable system definition on Respondents' First Amendment activities. Although the court of appeals had no opportunity to consider the validity of these restrictions, they are now before this Court. *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972).

"remedy the situation" if Congress disagreed with the lower court's ruling eliminating the discriminatory classification between SMATV operators based solely upon the ownership of the real estate served. Such congressional silence portends acquiescence, especially in light of the four-month period following the decision during which Congress substantially revised the 1984 Act and could have made its purpose known with a newly crafted exemption. *Lorillard v. Pons,* 434 U.S. 575, 580 (1978). Respondents suggest that the central issue in this case is moot, rendering the Government's appeal a request for an advisory opinion on what the conceivable basis underlying the cable system definition in the 1984 Act might have been when Congress in the 1992 Act has evidenced a different policy determination in accord with the lower court's holding.

Should congressional silence be construed in a contrary fashion, the challenged classification is subject to heightened scrutiny, as it discriminatorily imposes affirmative obligations on a particular group in the exercise of First Amendment rights. *Police Dep't of Chicago v. Mosley,* 408 U.S. 92 (1972); *Zablocki v. Redhail,* 434 U.S. 374 (1978). Those obstacles are erected by the 1992 Act as applicable to all speakers defined as cable systems. The discriminatory classification is not narrowly tailored to serve the "conceivable" legislative interest posited by the Government nor is such interest a compelling one. *Carey v. Brown,* 447 U.S. 455 (1980). Even in the absence of heightened scrutiny, the discriminatory classification is not rationally related to a legitimate governmental purpose.

The Government hypothesizes that Congress enacted the discriminatory classification to serve the interest of consumer welfare by subjecting SMATV systems of a larger size to regulatory treatment as cable systems. Smaller SMATV systems were exempted, according to the Government, because the cost of regulation outweighed the benefits and consumer leverage over systems serving

commonly-owned dwellings is greater. The Government's conceived interest is explicitly contradicted by the record, however, thus leaving the discriminatory classification bereft of any basis.

Congress' cable system definition was modeled upon the FCC's definition initially adopted in 1965. Apart from the commonly-owned exemption, the FCC's definition contained a specific exemption excluding cable systems "serv[ing] fewer than 50 subscribers." The FCC's rules also established classifications based upon the "total number of subscribers served" as a means to distinguish among cable systems for purposes of imposing graduated levels of regulatory burdens. In fashioning its own cable system definition, Congress *rejected* the "system size" exemption as well as the regulatory scheme based on the number of subscribers served. While rational basis review does not require an "articulated" purpose, the Government cannot advance a "conceivable" basis that is expressly contradicted by Congress' own policy choices. Nor can citing the "rough accommodation" litany overshadow the fact that Congress *affirmatively* elected to eliminate a mathematically precise manner of achieving the "conceived" legislative interest. Congress' refusal to regulate *directly* based on system size defeats any assertion that the *wholly independent* "commonly-owned" exemption was meant to regulate system size *indirectly*. Rather the "commonly-owned" exemption, applicable only to *MATV* systems until just prior to the 1984 Act, merely reflected the FCC's judgment that systems functioning as a common antenna "amenity" for residents of multiunit dwellings posed no threat to broadcast service, the nexus for federal jurisdiction over cable systems at that time.

The Government's "conceived" basis is similarly contradicted by Congress' decision *not* to subject larger video distributors such as MMDS and DBS to regulation as cable systems. Had Congress intended to protect consumers from being "exploited" at the hands of larger suppliers, such systems would have been included in the cable system definition. While Congress may handle a problem "one step at a time," the Government fails to explain that the "step" attributed to Congress is in the opposite direction of where federal policy is headed, *i.e.*, a long-standing fifteen year decision not to subject wireless systems to cable system regulation. Recognizing this, the Government claims the "conceivable" basis justifying the discriminatory treatment accorded wired versus wireless technologies serving separately-owned dwellings is not consumer protection, but an incentive for wired technologies to switch to a wireless format. Why Congress intended to impose regulation on larger systems and then encourage those systems to evade regulation by "switching" is unexplained, as is the fact that such reasoning opposes decades of policy expressly advocating migration away from scarce spectrum resources.

In the 1984 Act, Congress adopted a dual federal-local regulatory framework despite its policy since the inception of radio to retain exclusive jurisdiction over interstate media. The sole nexus for local regulation was the necessity for cable systems to install facilities in the public rights-of-way for the delivery of such interstate signals. Immediately prior thereto, the FCC had preempted local regulation of SMATV facilities not using public rights-of-way. The FCC's explicit rationale for preserving exclusive jurisdiction was the federal interest in promoting the "unfettered development of interstate transmission of satellite signals." *ESCOM*, 95 F.C.C.2d at 1230-31. Local regulation interfered with this open sky policy by reducing the number of satellite receive points available to consumers. *Id.* The FCC restricted its preemption without explanation to those SMATV facilities serving commonly-owned dwellings even though SMATV systems serving separately-owned dwellings advanced the same federal interest in

promoting the free flow of interstate satellite signals and made no use of public rights-of-way. Congress adopted the *ESCOM* decision which fell within the ambit of the "commonly-owned" exemption to the cable system definition, and thus unwittingly created the discriminatory classification at issue here.

Consistent with this Court's precedents, the court of appeals properly refused to uphold the challenged classification since it rests upon a feigned rather than a real difference between First Amendment speakers. The Government simply has not articulated a conceivable basis for the discriminatory classification.

ARGUMENT

I. A CASE OR CONTROVERSY NO LONGER EXISTS BETWEEN THE PARTIES SINCE CONGRESS ADOPTED THE COURT OF APPEALS' CONSTRUCTION OF SECTION 602(6) WHEN IT PASSED THE 1992 ACT.

The court of appeals invited Congress to "act to remedy the situation" if Congress determined that the majority had "misunderstood congressional intent in [its] construction of the Act and its underlying purposes." Pet. App. at 6a-7a. The court of appeals was aware of Congress' intended revision of the 1984 Act, having been advised of same by the FCC:

> The Court should be aware that significant cable legislation is before Congress now, [citation omitted], and that Congress in the context of considering that legislation will have an opportunity to revise the definitional provisions of the 1984 Act if it chooses. Some interested parties have brought the Court's decision in this case to the attention of the relevant committees and have suggested legislative language to address the equal protection question identified in the majority opinion in this case.

Pet. App. at 51a-52a. The court of appeals issued its final

decision on June 9, 1992. The 1992 Act was enacted nearly four months later on October 5, 1992. Despite full knowledge of the lower court's decision, Congress chose not to alter the language of the statutory provision nor comment in any way on the majority's holding.

Congress is certainly not reluctant to signal its disapproval of judicial decisions construing federal statutes. Where, as here, Congress had been completely silent concerning any justification for its discriminatory classification, Congress' decision to remain silent strongly suggests its agreement with the outcome below, especially in the face of explicit invitations to do otherwise if such decision were deemed at odds with congressional intent.[6] Should this Court reverse the holding below, current congressional intent *not* to subject SMATV operators interconnecting separately-owned buildings by wire to regulation as cable systems would be frustrated.

Prior to enactment of the 1992 Act, the FCC expressed its own "policy preference" *not* to treat such operators as cable systems:

> [T]he Commission in an earlier interpretation of the cable definition had taken the position that, when multiple unit dwellings are involved, a facility's use of the public right-of-way should be the sole basis for determining the facility's status as a

[6] "Congress is presumed to be aware of [ ] . . . judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change. . ." *Lorillard*, 434 U.S. at 580 (citation omitted); *accord*, *Merrill Lynch Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381-82 (1982). It is especially appropriate to assume congressional adoption of judicial decisions that are "long-standing and well known . . ." *Ankenbrandt v. Richards*, 112 S.Ct. 2206, 2213 (1992). Although not "longstanding," the lower court's opinion was made known to Congress at the perfect time for Congress to respond, if such was its intent, since Congress was in the midst of making substantial changes to the 1984 Act. In this case, the *recency* of the court of appeals' opinion reinforces the presumption that Congress approved of it.

> cable system and therefore its susceptibility to local franchise regulation [citation omitted]. Under that interpretation, *which reflected the Commission's own policy preference, none of the facilities under consideration here would have been subject to franchise regulation under the Cable Act.*
>
> * * *
>
> The Commission's current interpretation of the cable definition, which results in the regulatory distinctions that are challenged on equal protection grounds, was dictated by the unambiguous language of the statute, *and not by any policy determination by the FCC in support of that interpretation.*

Pet. App. at 47a, 50a-51a (emphasis added). Surely Congress knew of the expert agency's conclusion that the discriminatory classification set forth in §602(6) ran counter to FCC policy. Whatever Congress may have believed FCC policy concerning the alleged need for local regulation over such SMATV operators was prior to the 1984 Act, Congress clearly did not understand FCC policy to be the same prior to the 1992 Act. If, as the Government contends, Congress is deemed to have followed pre-1984 Act FCC policy on this issue in originally enacting §602(6),[7] it is equally true that in passing the 1992 Act Congress must have followed the FCC's *current* policy opposing treatment of such SMATV operators as cable systems.

The Government apparently assumes that Congress was powerless to alter the outcome below in claiming that "Congress has *not* acquiesced in the lower court's constitutional holding in this case." Reply Brief For Petitioners On Petition For a Writ of Certiorari, p.8, n.7. To the contrary, since Congress could have "corrected" the

[7] Respondents disagree that FCC policy prior to the 1984 Act *authorized* local jurisdiction over *SMATV* facilities operating wholly on private property and serving separately-owned multiunit dwellings via a hardwire interconnection. *See* Section IV, *infra.*

decision,[8] its failure to do so reflects an intent to codify the state of the law with respect to the regulatory treatment of SMATV systems as it existed at the time it made substantial revisions to other areas of cable legislation. *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979). It is irrational to suggest that Congress remained silent in the hopes that this Court would grant certiorari and then interpret that silence in a manner inconsistent with established precedent regarding legislative adoption of existing law, when Congress could have resolved all doubt as to the nature of the governmental interest which the challenged classification was intended to further.

In this regard, Respondents must question whether a case or controversy continues to exist in this case. There is nothing to counter the presumption that current congressional intent coincides with Respondents' contention and the FCC's preference that SMATV facilities operating wholly on private property and interconnecting separately-owned multiunit dwellings by wire are not cable systems. Whether the court of appeals actually exceeded the boundaries of this Court's precedents governing rationality review (a conclusion with which Respondents disagree) is irrelevant if the result reached has been endorsed by Congress and the expert agency charged with implementing congressional intent. In seeking review as to whether the lower court applied proper rationality review, the Government is essentially requesting an advisory opinion on what the conceivable basis underlying §602(6) in the *1984* Act

[8] For example, Congress could have crafted an exception to the definition for facilities serving fewer than a fixed number of subscribers. At a minimum, Congress could have reenacted the current provision and, in the legislative history, articulated a justification for the exemption at issue, rather than leaving it for the parties and this Court to conceive of one. *See Helvering v. Griffiths*, 318 U.S. 371, 389 (1943) ("We think if Congress had passed or intended to pass an Act challenging a well known constitutional decision of this Court there would appear at least one clear statement of that purpose either from its proponents or its adversaries.").

might have been when Congress in the *1992* Act has evidenced a different policy determination.

Respondents suggest that the central issue in this case is moot. *United States Dep't of Justice v. Provenzano*, 469 U.S. 14, 15 (1984) (per curiam) (new legislation resolving dispute renders case moot). Accordingly, Respondents respectfully request that this Court hold that SMATV operators interconnecting separately-owned multiunit dwellings by wire are not included within §602(6) and remand this case for dismissal. *Diffenderfer*, 404 U.S. at 415.

II. THE CHALLENGED PROVISION DISCRIMINATING AMONG FIRST AMENDMENT SPEAKERS IS SUBJECT TO STRICT SCRUTINY.

When a statute is challenged on equal protection grounds, this Court "must first determine what burden of justification the classification created thereby must meet, by looking to the nature of the classification and the individual interests affected." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 253 (1974). At a minimum, the classification must be rationally related to a legitimate governmental interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam).

Such minimum scrutiny applies "only when no constitutional provision other than the Equal Protection Clause itself is apposite." *Id.* at 304, n.5. If the classification "significantly interferes" with the exercise of a constitutionally protected fundamental right, the statute is subject to a more demanding level of scrutiny. *Zablocki*, 434 U.S. at 388. Under the strict scrutiny test, this Court must determine whether the classification is "necessary to promote a compelling state interest." *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969). A regulation that classifies speakers on the basis of their First Amendment

activities, and then imposes affirmative obligations on only some of the classes so created, is subject to strict scrutiny. *Carey*, 447 U.S. at 461-62. In such cases, "Equal Protection . . . mandates that the legislation be finely tailored to serve substantial [governmental] interests, and the justification offered for any distinction it draws must be carefully scrutinized." *Id.*[9]

The Government does not contest the court of appeals' determination that the Respondents' equal protection challenge is ripe. Pet. App. at 32a. Ruling that the challenged classification failed to satisfy the rational basis standard of review, the lower court refrained from considering whether a heightened scrutiny equal protection challenge was ripe. Pet. App. at 32a. Yet such a heightened scrutiny challenge is ripe.[10]

A claim is ripe if "the issues tendered are appropriate for judicial review . . . ." *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967). Before this Court is a classifi-

[9] *Accord Bullock v. Carter*, 405 U.S. 134, 144 (1972) (strict scrutiny applied to statute that imposed extremely high registration fees in certain primary elections, necessarily excluding some potential candidates, particularly those supported by poorer people, whose First Amendment rights were thereby implicated); *American Party v. White*, 415 U.S. 767, 780 (1974) (applying strict scrutiny to ballot access procedure applied to all political parties except those that had received at least two percent of the vote in the preceding general election since statute placed affirmative oblitations on the ability of new and small political parties to exercise First Amendment rights on an equal basis with larger, established parties which qualified for the exemption).

[10] The fact that the court of appeals found Respondents' substantive First Amendment challenge to be unripe, Pet. App. at 28a, does not diminish the ripeness of the heightened-scrutiny equal protection challenge. The lower court recognized that the cable system definition posed "a First Amendment problem" since " '[c]able television . . . is engaged in "speech" under the First Amendment,' *Leathers v. Medlock*, 111 S.Ct. 1438, 1442 (1992)." Pet. App. at 25a. Congress' imposition of First Amendment "problems" in the path of only *some* First Amendment speakers gives rise to strict scrutiny under equal protection analysis. *See infra* at 14-16.

cation that would render some of Respondents' SMATV systems illegal, subject others to burdensome local franchising restrictions such as the universal service requirement advocated by *amici*,[11] and chill Respondents' current plans to serve additional sites since to do so requires that a franchise application process be followed with no guarantee that the application will be granted.[12]

In addition, under §§3-5 of the 1992 Act, 106 Stat. 1471-77, a cable system is required to carry certain broadcast programming on its basic tier pursuant to a scheme that is very similar to previous "must carry" requirements that were twice struck down due to the "substantial First Amendment costs" they inflicted on cable operators' editorial discretion. *Quincy Cable TV v. FCC*, 768 F.2d 1434, 1461 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *clarified*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988). The 1992 Act also imposes rate regulation on cable systems

[11] *See amicus* brief of National League of Cities, *et al.* at 20. Respondent Pacific Cablevision faces such universal service requirements in San Diego, California where, but for the lower court ruling, Pacific would be forced to shut down a facility which currently provides service to residents of several separately owned buildings, or seek a franchise that either would be denied, prohibiting Pacific from speaking, or granted under the condition that Pacific expend the hundreds of thousands of dollars necessary to expand its service area to match that of the existing franchised operator, covering several hundred thousand residents. Cal. Gov. Code §53066.3 (West Supp. 1990). Supp. Br. of Pet., p. 4 (filed D.C. Cir. Dec. 16, 1991).

[12] According to the Government, Congress knew that the franchise requirement imposed substantial burdens on SMATV operators since Congress exempted wireless systems as a means of encouraging video distributors to switch from wired to wireless technology. This suggests that Congress felt that the franchise requirement was so severe that a video distributor who interconnects two buildings by wire will find it worthwhile to purchase and install an entirely new distribution system to interconnect those buildings rather than endure the burdens of franchising.

that are not subject to "effective competition," 1992 Act, §3, 106 Stat. 1464, thus placing direct financial burdens on the exercise of free speech rights, and permits local authorities to deny a franchise request if the cable operator does not guarantee universal service. 1992 Act, §7, 106 Stat. 1483. *See* n.11, *supra*. The 1992 Act also dictates customer service standards, §8, 106 Stat. 1484; leased commercial access, §9, 106 Stat. 1484; cross-ownership prohibitions, §11, 106 Stat. 1486; anti-trafficking, §13, 106 Stat. 1488; minimum technical standards, §16, 106 Stat. 1490; and subscriber privacy, §20, 106 Stat. 1497. Thus, apart from creating the discriminatory classification which is ripe for equal protection analysis, Congress has also prescribed the degree of the burden to be imposed on those falling within that classification. Congress' decision to "place obstacles in the path of a [person's] exercise of . . . freedom of [speech]" must be examined with strict scrutiny when the person so burdened has been singled out by Congress for discriminatory treatment. *Regan v. Taxation With Representation*, 461 U.S. 540, 549-50 (1983) (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)).

For this reason, strict scrutiny was applied in examining a city ordinance which prohibited all picketing in the vicinity of schools, except peaceful picketing of any school involved in a labor dispute. *Police Dep't of Chicago v. Mosley*, 408 U.S. at 99. Although the regulation at issue in *Mosley* was especially repugnant to the Constitution because it was content-based, this Court recognized that strict scrutiny was applicable even if the State discriminated among speakers on bases other than the content of their speech. For example, this Court held that although "[c]onflicting demands on the same place may compel the State to make choices among potential users and uses", such "discriminations . . . must be tailored to

serve a substantial governmental interest." *Id.* at 98, 99.[13]

Strict scrutiny is applied when the classification discriminatorily imposes affirmative obligations on a particular class of persons exercising their fundamental rights. In *Zablocki,* this Court applied strict scrutiny to a statute prohibiting certain residents from exercising their fundamental right to marry without prior court approval. The restriction applied only to persons who were under a court order to provide support for children not in their custody. Strict scrutiny was appropriate given the "direct legal obstacle in the path of persons desiring to get married" that the State had created. 434 U.S. at 387, n.12. By contrast, a statute which eliminated certain Social Security benefits upon the marriage of the beneficiary did not invoke heightened scrutiny. *Califano v. Jobst,* 434 U.S. 47, 53-54 (1977).

The scope of this rule is perhaps best demonstrated by its exception. In *Maher v. Roe,* 432 U.S. 464 (1977), this Court applied the rational relationship test in a case brought by two indigent women challenging a state regulation which provided funding for childbirth, but not for non-therapeutic abortions. This Court declined to apply strict scrutiny, even though the regulation involved the indigent women's fundamental right to be free from undue interference with respect to the termination of their pregnancies, and even though the denial of benefits might mean an inability to obtain an abortion, when wealthier women would be able to do so. *Id.* at 474. As the Court held:

The Connecticut regulation places no obstacles –

[13] Both *Mosley* and *Carey* were public forum cases. They apply with equal, if not greater force, to the cable system definition which, as construed by the Government, places an obstacle to speech on private property engaged in by a person who has been invited on the property by the property owner for the specific purpose of exercising First Amendment rights. *See Stanley v. Griffin,* 394 U.S. 557, 565 (1969).

> absolute or otherwise – in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth. . . . The indigency that may make it difficult – and in some cases, perhaps, impossible – for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in *Roe* [*v. Wade,* 410 U.S. 113 (1973)].

Maher, 432 U.S. at 474. *See also Regan,* 461 U.S. at 549 (applying rational basis test because tax regulation restricting the ability of nonprofit entities to lobby, but containing an exemption for certain veterans' organizations, amounted to nothing more than a subsidy for the exempted organizations).

Thus, the Government's denial of the funding necessary to exercise a fundamental right usually triggers the minimal rational basis standard of review; any affirmative restrictions imposed by the Government which create, on a selective basis, new obstacles to the exercise of such a right invariably require strict scrutiny.[14] While the strict scrutiny test applies in the instant case, the discriminatory classification survives neither test.

III. CONGRESS REJECTED THE GOVERNMENT'S CONCEIVED BASIS FOR THE DISCRIMINATORY CLASSIFICATION.

A. Congress Rejected The FCC's Pre-1984 System Size Exemption To Its Cable System Definition.

Contrary to the Government's conclusion, the fact that the FCC's pre-1984 cable system definition contained

[14] Regulations which classify speakers and speech also are subject to direct First Amendment challenges and receive rigorous scrutiny by this Court. *See, e.g., Boos v. Barry,* 485 U.S. 312 [footnote continued]

essentially the same "commonly-owned" exemption as that found in §602(6) does not buttress the Government's hypothesis that Congress enacted the discriminatory classification in order to subject systems of a larger size to regulatory treatment as cable systems. In so hypothesizing, the Government studiously avoids the fact that Congress specifically *rejected* the FCC's own additional, contemporaneous exemption expressly excluding smaller systems from regulatory burdens, and only retained the "commonly-owned" exemption.

The FCC's initial cable system definition contained the following two exemptions:

> (1) *any such facility which serves fewer than 50 subscribers*, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

First Report & Order in Docket Nos. 14895 & 15233, 38 F.C.C. 683, 741 (1965) (emphasis added). There is no discussion of the cable system definition or either of its two exemptions in the 1965 Report. The definition merely appears in the Appendix. Moreover, the 1965 Report addressed the competitive threat traditional cable systems allegedly posed to off-air television broadcasters and what *federal* regulatory response was warranted, *e.g.*, the possible imposition of mandatory signal carriage rules, not what local regulation might be permissible.

In later adopting the signal carriage and network nonduplication-syndicated exclusivity regulations proposed in the 1965 Report, the FCC's cable system definition and its two exemptions remained unchanged. *Second Report & Order in Docket Nos. 14895, 15233, & 15971,*

(1988) (regulation must be necessary to serve a compelling state interest and narrowly drawn to achieve that end); *accord, First National Bank v. Bellotti*, 435 U.S. 765, 784-86 (1978).

2 F.C.C.2d 725, 797 (1966). The definition again appears in the Appendix to the Report without explanation. The only reference to the definition in the text reads: "Excluded from these rules will be those *CATV* systems which serve less than 50 subscribers, or which serve only as an apartment-house *master antenna*." *Id.* at 764, n.32 (emphasis added). Although brief, this description of the two exemptions indicates that the "system size" exemption was intended to exclude the very smallest of cable television systems from compliance with federal regulation. However, the "commonly-owned" exemption was totally unrelated to system size; large as well as small master antenna systems were exempt from federal regulation. This exemption sought to exclude those systems which employed similar CATV technology, *i.e.*, a television antenna and coaxial cable, but which served a different *function, i.e.*, to act as a common receptor for the receipt of off-air television signals for the benefit of the residents of apartment houses where individual antennas were impractical and/or ineffective.

In 1977, the FCC undertook a comprehensive examination of its cable system definition. *First Report & Order in Docket No. 20561*, 63 F.C.C.2d 956 (1977). In retaining the "*system size*" exemption, the FCC specifically discussed its purpose in terms nearly identical to the Government's proffered justification here for the discriminatory "*commonly-owned*" classification:

> Obviously these qualifying elements [of the 'categorical exclusions' to the cable system definition] do not determine whether or not a given facility is a cable television system in a technical sense. They reflect instead certain public interest judgments made by this Commission with respect to regulating cable television systems. For instance, cable facilities serving 50 or fewer subscribers were presumed to be too small and two few in number to

> engender any realistic concern over their potential impact on local over-the-air television, either singly or in the aggregate, and thus the relative burden such systems would bear in complying with our Rules would be excessive and unnecessary. For this reason such cable facilities were exempted from our definition, not because they could not rightly be defined as 'systems', but because we had determined that it would not serve the public interest to regulate them as such.

Id. at 964. *See also id.* at 976 (50 subscriber exemption rests on "judgment that systems of this size are of minimal regulatory concern").

Equally significant, the FCC adopted rules for the first time which reduced the regulatory burdens imposed on systems between 50 and 499 subscribers. *Id.* at 981-990. In doing so, the FCC stressed that such systems are "reception only" facilities, *i.e.*, do not engage in program origination services, retransmit only local off-air, rather than distant, television broadcast signals, and are unlikely to be "injurious" to local broadcast service.[15] The FCC further inquired as to whether a like reduction in regulatory burdens ought to be applied to cable systems serving between 500 and 1000 subscribers. The FCC had already classified systems serving less than 1000 subscribers as exempt from the FCC's syndicated and network program exclusivity rules. *Id.* at 970 ("This regulatory approach is sound . . . because it protects local broadcasters from the possible adverse impact of cable carriage of duplicating signals while placing the burden of protection on those cable facilities having sufficient size to bear it."). The FCC had exempted systems with fewer than 3500 subscribers from FCC rules requiring program origination and the provision of public, educational and governmental access channels. *Id.* at 982. All of these classifications demonstrate the FCC's repeated practice of using the "total number of subscribers served" as the true measure of system size in order to distinguish among cable systems for purposes of regulatory treatment.[16] The 1977 Report, like the FCC's earlier reports, consistently justified such differential regulatory treatment on conclusions as to which systems were more likely to pose a competitive threat to local broadcast stations.

[15]The FCC had solicited comment on whether systems with fewer than 250 subscribers might not be deserving of total exemption from FCC rules for similar reasons. 63 F.C.C.2d at 976.

It was within this environment that Congress first stepped in to provide a comprehensive federal program for the treatment of cable systems. While the FCC had employed the cable system definition solely to determine which interstate facilities would be subject to federal regulation as cable systems, Congress adopted its definition to control which interstate facilities would be subject to dual federal-local regulation. A simple comparison of the cable system definition adopted by Congress in the 1984 Act (Section 602(6)) and the FCC's cable system definition existing at the time of passage (47 C.F.R. §76.5(a) (1984)) demonstrates that Congress specifically rejected "system size" as a regulatory tool for either federal or local regulation. Congress did *not* retain the FCC's exemption for systems serving fewer than 50 subscribers. Any system meeting the definition of a cable system was subject to both the federal and local regulation established in the Act no matter how small. Congress also did not retain the various classifications adopted in the 1977 Report applying reduced regulatory burdens to cable systems depending on the number of subscribers served.

[16]"[W]ith the creation of different classes of systems based on total number of subscribers served, it has become most important for regulatory purposes that our records reflect *as accurately as possible the size* of each system in its entirety." 63 F.C.C.2d at 973-74 (emphasis added).

These congressional actions alone rebut the Government's unsubstantiated assertion that Congress' retention of the *wholly independent* "commonly-owned" exemption was meant to regulate *indirectly* what Congress chose not to regulate *directly*, *i.e.*, cable systems based on "system size" distinctions. While, for purposes of rational basis scrutiny, the Government need not provide empirical proof or an articulated legislative purpose for the discriminatory classification, the Government cannot advance "conceivable" bases that are expressly contradicted by Congress' own policy choices. Such contradiction renders such conceivable bases inconceivable. And while, for purposes of rational basis scrutiny, the Government need only show a "rough accommodation" underlying congressional classifications, there is a substantial difference between a rough accommodation where Congress is silent on the issue and an *affirmative* election by Congress to eliminate a mathematically precise manner of achieving the legislative purpose advanced by the Government. That rejection defeats any notion that the legislative purpose for the cable system definition was to draw a line between smaller and larger systems for application of federal and local regulation.[17]

B. The Co-existence Of The System Size And Commonly-Owned Exemptions Proves The Latter Was Unrelated To System Size Considerations

A tandem argument the Government ignores is why the FCC would have had two exemptions to accomplish the same purpose, *i.e.*, to exempt smaller systems from regulation, or why the FCC would not have incorporated

[17] The Government's admission that the classification is a "rough accommodation" and that a *direct* "system size" exemption would constitute a more precise means of achieving regulation of larger systems, Br. at 24-25, virtually concedes that the discriminatory classification cannot withstand strict scrutiny review were this justification to be accepted by this Court.

MATV systems within the classifications keyed to reduced regulatory burdens depending upon the total number of subscribers served. The FCC's 1977 Report clearly establishes that the "commonly-owned" exemption had nothing to do with subjecting only larger cable systems to regulation, but rather applied to small and large systems alike. Such systems had become known not as "small" CATV systems but as MATV systems.[18]

In retaining the "MATV exemption" "*regardless of the size or function performed*", *id.* at 991 (emphasis added), the FCC emphasized that federal regulation of MATV systems had not been "justified on grounds of their actual or potential harm to over-the-air television." *Id.* at 996.[19] Since federal regulation over CATV was tailored to rules protecting local broadcasters, application of such rules to MATV systems not viewed as endangering the broadcast service was unnecessary. The purpose of the "commonly-owned" exemption was simply a deregulatory one; the FCC had no interest in regulating MATV systems, no matter what their size, whose function was simply to serve as a common antenna for multiunit dwellings:

> What we seek to establish are concepts of "amenity", convenience and even feasibility which serve

[18] In that proceeding, the FCC even debated whether larger "over 1000 unit" MATV systems under common ownership should be exempt from federal regulation. Such debate did not center on whether consumers were more likely to have sufficient bargaining power over landlords that they could influence the conduct of such systems, but rather over whether such systems functioned to provide services beyond the passive reception of local off-air signals, thus potentially threatening the survival of local broadcast stations. 63 F.C.C.2d at 991. The FCC clearly *rejected* system size as a regulatory tool for MATV as opposed to CATV.

[19] The FCC did however alter the language of the exemption, substituting the term "multiple unit dwellings" for "apartment dwellings." This revision merely clarified the scope of the MATV exemption, insuring its applicability to multiunit dwelling facilities but not facilities serving single family homes. 63 F.C.C.2d at 996.

> to set excluded facilities apart from regulated (cable) facilities. By amenity we mean a lessor's or a manager's use of master antenna service as a secondary or incidental inducement to occupancy of his residential facility. By convenience, we are suggesting the efficiency and economy, even the aesthetics, of having a single, shared receptor rather than a forest of antennas on the roof of a multiple unit dwelling. By feasibility we refer to the realities of a television signal's shadowing and blocking when it must travel among highrise buildings, making a tall antenna . . . the only means of receiving service. Under such circumstances the erection of a high master antenna becomes not a competitive entry into something like cable television service but an almost necessary improvement to the business of leasing or selling dwellings.

Id. at 997.

The 1977 Report does not discuss whether MATV systems ever served separately, as opposed to commonly, owned multiunit dwellings. If such systems existed, the FCC proffers no rationale for distinguishing between them for regulatory purposes. If such systems did not exist, then the classification was not meant to be discriminatory at all; it would simply have been intended to be an accurate description of the function of all MATV facilities, *i.e.*, antenna service to commonly owned dwellings.[20]

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[20] While the FCC was also silent with respect to whether any nexus existed for local regulation over MATV systems, the FCC had specifically questioned such authority over MATV systems not using the public rights-of-way in its earlier notice:

> There are, of course, differences as well as similarities [between CATV and MATV] which would have to be recognized in any rules adopted. *Because no use is made of local rights-of-way, for example, such [MATV] systems would rarely be required by local laws to obtain a franchise before commencing operation.*

[footnote continued]

Less than a year later, the FCC reaffirmed these decisions. *Memorandum Opinion & Order in Docket No. 20561*, 67 F.C.C.2d 716 (1978). Rejecting arguments that MATV systems should be regulated because of an alleged competitive threat to *cable television* rather than broadcast television, the FCC reiterated that its central purpose in imposing regulation at all upon cable systems was preservation of free, off-air broadcast service:

> Our original definition of a cable television system . . . recognized "MATV" systems as a *different entity for regulatory purposes* and, accordingly, contained a specific exception for such systems. . . . [N]ot only did we feel that MATV systems were substantially different from traditional cable television systems so as to justify continued exemption from our regulations but we also were strongly impressed by the argument that none of the . . . parties *demonstrated actual or potential harm to over-the-air broadcasting by existing MATV systems — a nexus of our jurisdiction over cable systems.*

Id. at 725 (emphasis added). Having no regulatory nexus, the FCC refused to encompass MATV systems within the regulatory classifications established for cable systems on the basis of the total number of subscribers served.[21]

Notice of Proposed Rulemaking in Docket No. 20561, 54 F.C.C.2d 824, 835 (1975) (emphasis added).

[21] The Government emphasizes a single paragraph out of all the pre-1984 FCC reports to contend that the FCC's underlying purpose for the continued deregulation of MATV systems was the fact that their "system size" rendered the cost of regulation excessive in terms of the benefits achieved. Br. at 22-24, discussing *1978* Report at 726. To parse a single paragraph which itself combines the reasoning set forth by the FCC for its various "system size/subscriber number" categories with the reasoning set forth by the FCC in the *1977* Report governing the commonly-owned exemption is to lend confusion where there is none in an obvious attempt to graft a *post hoc* justification onto FCC pronouncements that definitively present a wholly different purpose for the "commonly-

[footnote continued]

Again, the 1978 Report contains no analysis of whether any distinction was intended between MATV systems serving separately-owned (if such existed), as opposed to commonly-owned, dwellings and if so, the basis for such a distinction. The 1978 Report is also silent concerning any local regulatory nexus over MATV systems.

C. Had Congress Intended To Subject Larger Multichannel Video Programming Systems To Treatment As Cable Systems In Order To Benefit Consumer Welfare, Congress Would Have Included MMDS and DBS Systems Within The Definition Of A Cable System.

Congress could not have plausibly assumed that nonexempt SMATV facilities were larger than other video programming distributors left exempt from cable system regulation. It is undisputed that MMDS and DBS operators are not cable systems. J.A. at 8-11. Such systems are exempt even if separately-owned multiunit buildings are interconnected by the use of nonphysical wireless transmission. It is also undisputed that such operators either serve or have the capability to serve larger subscriber bases than the nonexempt SMATV facilities ever will serve.[22] These "legislative facts" directly contradict

owned" exemption than the fact that such systems were more likely than not "smaller" and thus more easily influenced by consumers. Clearly, the 1977 Report presents the most complete picture as to the FCC's deregulatory purpose behind this exemption.

[22]MMDS operators are entitled to serve on an interference protected basis all single family and multifamily properties falling within a 15-mile radius of their transmission facilities. *See* 47 C.F.R. 21.902(d)(1) (1991). DBS operators will be able to provide nationwide service. *In re Continental Satellite Corp.*, 4 F.C.C. Rcd. 6092 (1989). Since the 1984 Act, and known to Congress prior to passage of the 1992 Act, additional multichannel video distributors have been authorized which automatically serve larger subscriber bases than the nonexempt SMATV facilities and yet which are exempt from local regulation. *See Amendment Of Part 94 Of The Commission's Rules*, 6 F.C.C. Rcd. 1270 (1991).

the claim that Congress enacted the discriminatory classification as a means of protecting consumers from being "exploited" at the hands of an unregulated, larger supplier of multichannel video services. The absolute exemption for wireless systems, regardless of system size, proves that the congressional line-drawing contained in the 1984 Act was not based on a desire to treat all larger multichannel video programming distributors as cable systems for regulatory purposes.

Given such gross underinclusiveness, the Government suggests a *different* conceivable basis for discriminatory treatment of SMATV facilities interconnecting separately-owned buildings by wire and video facilities interconnecting such buildings by wireless transmission: "In fact, there is a rational basis for exempting wireless technologies *that has nothing to do with consumer protection*; Congress may have been trying to provide a deregulatory incentive to switch to such technologies." Br. at 28, n.23 (emphasis added). However, the assumption that SMATV facilities might switch to wireless technologies to avoid regulation as a cable system does *not* explain why Congress did not subject such wireless technologies themselves to similar regulation if Congress truly concluded that consumers of larger systems needed such protection.[23] Taken as a whole, the Government's attempt to attribute rationality relies on two contradictory bases: 1) Congress meant to

[23]The Government claims that Respondents' challenge to the discriminatory classification as between wired and wireless facilities serving separately-owned multiunit dwellings is not before this Court. The Government is in error. The fact that the court of appeals, having already invalidated the legislative classification, did not need to reach this additional discriminatory classification does not remove such classification from this Court's scrutiny. Respondents are entitled to defend the judgment below even on grounds not considered by the lower court. *See Dandridge v. Williams*, 397 U.S. 471, 475, n.6 (1970). In any event, such inquiry properly probes the "conceivability" of the "system size" rationale. *United States v. Speers*, 382 U.S. 266, 277, n.22 (1965).

impose regulation on larger systems; and 2) Congress meant to encourage those same larger systems to *evade* regulation by switching to wireless technology.

Congress' failure to treat such wired versus wireless systems equally cannot be brushed aside by a mere recitation to this Court's precedent holding that Congress may handle a problem one step at a time. What the Government fails to address is that the "step" it attributes to Congress is in the opposite direction of where federal policy is headed. The FCC preempted local regulation of wireless systems in 1978. *In re Orth-O-Vision, Inc.*, 69 F.C.C.2d 657 (1978), *recon. den'd*, 82 F.C.C.2d 179 (1980), *pet. for review den'd sub nom. New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982). Congress has chosen not to include MMDS in the cable system definition in the intervening 15 years, despite the passage of both the 1984 and 1992 Acts. In its Report, the FCC declined to offer any additional policy justifications for the discriminatory classification precisely because the FCC feared a step might be taken that would subject such wireless systems to regulation as cable systems, in contravention of what the FCC correctly characterized as congressional intent.[24]

Congress and the FCC have expressly determined that consumer welfare is best served by exempting these multichannel video programming systems from treatment as cable systems, no matter what their size. Again, either "system size" is not the rationale or the discriminatory classification is irrational as grossly underinclusive.

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[24] *See* Pet. App. at 48a-49a ("The majority implied that such a reasonable construction might take the form of including 'internal' systems within the definition of a cable system and thus subjecting them to local franchising requirements [citing the March 6 opinion at n.17 (Pet. App. at 31a-32a, n.17)] – a solution that would impose regulation on a class of systems that the Commission never has considered to be cable systems." *See also* Pet. App. at 50a.

D. Congress Has Consistently Sought To Rely On Marketplace Forces To Promote Consumer Welfare.

The Government's "consumer welfare" rationale is premised on an alleged congressional determination that regulation is the best means to protect the interests of consumers. Yet, in both the 1984 and 1992 Acts, Congress' primary goal is to rely on the marketplace, not regulation, to bring consumers diverse programming at the lowest possible rates with the best possible service.

The main impetus for passage of the 1984 Act was Congress' desire to rein in excessive local regulation found detrimental to the growth of the franchised cable industry. Congress was determined to foster competition between various suppliers of multichannel video services, finding regulation a poor substitute for free marketplace controls.[25] As discussed in Section IV, *infra*, the FCC, prior to 1984, had pursued a policy of preempting local regulation of MDS and SMATV systems on the grounds that local regulation was contrary to consumer welfare. *Orth-O-Vision; In re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223 (1983) ("*ESCOM*"), *aff'd sub nom. New York State Comm'n On Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) ("*NYSCCT*"). In the 1984 Act, Congress expressly endorsed the FCC's

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[25] One of the express purposes of the 1984 Act is to "promote competition in cable communications." 47 U.S.C. §521(6). *See also* S. Rep. No. 67, 98th Cong., 1st Sess. 31 (1983) ("The Committee believes that the development of new technologies and the efforts of competitors seeking to respond to consumer demand will bring more services to the public than will administrative regulations."); H.R. Rep. No. 934, 98th Cong., 2d Sess. 22-23 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4659-60 ("National communications policy has promoted the growth and development of alternative delivery systems for these services, such as DBS, SMATV, and subscription television. The public interest is served by this competition, and it should continue.").

decision to preempt state regulation of "an SMATV system which does not use public rights-of-way." H.R. Rep. No. 934 at 63, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4700.

Despite its deregulatory intent, the 1984 Act still left unbridled discretion in the hands of local regulators as to how many cable systems would serve the community. In examining the video services marketplace post-passage, Congress and the FCC frequently found that a single, community-wide franchised cable operator had become entrenched and unresponsive to consumer demand, in large part due to exclusive franchising practices. In its 1990 Report to Congress on the state of competition, the FCC found that "[l]ocal franchising requirements often discourage and even forbid competition, for reasons that have little to do with appropriate governmental interests such as public health and safety, repair of public rights-of-way and construction performance." *In re Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 F.C.C. Rcd. 4962, 4973 (1990).[26] The FCC recommended that Congress limit the regulatory control of local franchising authorities. *Id.* at 4974.

In addition to finding that *local* regulation of traditional franchised cable systems had contributed to a *decline* in consumer welfare, the FCC continued pursuing the policy developed prior to the 1984 Act of preempting local regulation of new competitors entering the multi-

[26] Overbuilds, in which cable systems engage in direct head-to-head competition with one another, affect less than one percent of all cable systems. *Id.* at 5013. Among the factors cited by the FCC which contributed to the "relative paucity of successful competitive cable systems" were "restrictive requirements by franchising authorities (*e.g.*, universal service requirements), and . . . predatory activity by incumbents, as well as other advantages of incumbency." *Id.* Of course, the "restrictive requirements" that local authorities sought to place on second franchisees simply increased the ability of the incumbent to exploit its incumbency.

channel video services marketplace, finding that deregulation would best serve consumer welfare.[27] The FCC has adhered to this policy post-passage of the 1992 Act.[28]

Congress, meanwhile, recognized that exclusive franchising by local regulators has placed undue market power in the hands of the traditional cable industry which has been able to exploit local distribution monopolies by thwarting market entry by competitors[29] and subjecting consumers to substantial annual rate increases[30] and infer-

[27] *See, e.g., Amendment of Part 94 of the Commission's Rules*, 6 F.C.C. Rcd. 1270, 1271 (1991):

> [C]able systems possess a disproportionate share of market power and, therefore, are capable of engaging in anticompetitive conduct. [footnote omitted] In these circumstances, competition provides the most effective safeguard against the specter of market power abuse. As competition from alternative multichannel providers such as second competitive cable operators, wireless cable/multi-point distribution services, SMATV systems, and direct broadcast satellites (DBS) emerges, we find that it would serve the public interest to encourage these rival operators to enter the market and enhance their competitive potential.

[28] In authorizing development of the "local multipoint distribution service," the newest wireless technology capable of delivering video programming, the FCC again preempted local regulation in order to "further [its] goal of using the disciplines of the marketplace to regulate the price, type, quality and quantity of video services available to the public." *See Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration*, 5 Rad. Reg. (P&F) 71:133, 135 (current service) (1993).

[29] 1992 Act, §2(a)(2), 106 Stat. 1460:

> For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers.

[30] *Id.*; S. Rep. No. 92, 102d Cong., 1st Sess. 7-8 (1991); H.R. Rep. No. 628, 102d Cong., 2d Sess. 30-34 (1992).

ior customer service.[31] Noting the FCC's finding that cable overbuilds exist in fewer than one percent of the markets, H. Rep. No. 628 at 45, Congress adopted the FCC's recommendation prohibiting the local imposition of restrictions that unreasonably discourage second franchises. 1992 Act, §7, 106 Stat. 1483.

The 1992 Act is in large part intended to restore the competitive balance between cable franchisees and their competitors so that consumers are no longer capable of being exploited by cable monopolies. Congress, in its Statement of Policy, reaffirmed its preference that competition, not regulatory intervention, promote consumer welfare.[32] Accordingly, a "principal goal" of the 1992 Act was "to encourage competition from alternative and new technologies, including competing cable systems, wireless cable, direct broadcast satellites, and *satellite master antenna television services.*" *Id.* at 27 (emphasis added). Congress chose not to impose local regulation on these "alternative" multichannel video distributors because of its determination that such distributors *must* keep rates low, service standards high, and programming diverse due to the extreme pressure brought to bear by the market power of the incumbent cable franchisee.[33]

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[31] S. Rep. No. 92 at 20-21.

[32] "It is the policy of the Congress in this Act to (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media; (2) *to rely on the marketplace to the maximum extent feasible, to achieve that ability. . . .*" 1992 Act at §2(b), 106 Stat. 1463 (emphasis added). *See* H. Rep. No. 628 at 30 ("[t]he Committee . . . strongly prefers competition and the development of a competitive marketplace to regulation"); *id.* at 34 ("a fully competitive marketplace ultimately will provide the most efficient and broadest safeguards for consumers").

[33] Indeed, perhaps the most controversial regultory aspect of the 1992 Act, rate regulation of cable systems, is applicable only to such systems which do not face "effective competition" from alternative sources of multichannel video programming, as defined by the Act. 1992 Act, §3, 106 Stat. 1464.

It has been congressional intent since the 1984 Act to rely as much as possible on market forces to foster competition and consumer welfare in the multichannel video marketplace. To the extent regulation has become necessary, it is the traditional community-wide cable systems which the FCC and Congress have recognized as being in need of restraint. Given Congress' overall deregulation approach, and its specific recognition of the need to encourage alternatives to traditional franchised operators, it strains credulity to suggest that Congress felt that, of all the possible targets, *non-monopoly* SMATV systems serving separately-owned multiunit dwellings, smaller than their wireless counterparts, were the facilities to be singled out for the purpose of advancing some generalized notion of consumer welfare.

IV. LIKE OTHER EXEMPT INTERSTATE MEDIA, NON-EXEMPT SMATV FACILITIES ADVANCE THE UNFETTERED DEVELOPMENT OF SATELLITE COMMUNICATIONS AND ARE LOCARED WHOLLY ON PRIVATE PROPERTY.

The FCC's cable system definition was intended to determine the extent of federal regulation to be applied, not whether localities possessed the authority to franchise interstate media of communications. The FCC decided questions of local jurisdiction instead through a series of preemption decisions.

In 1972, the FCC issued its seminal decision on cable regulation, including the degree to which local jurisdiction over cable systems would be tolerated despite the retention of exclusive federal jurisdiction over interstate media of communications. *Cable Television Report & Order,* 36 F.C.C.2d 143 (1972), *recon.,* 36 F.C.C.2d 326 (1972), *pet. for review den'd sub nom. ACLU v. FCC,*

523 F.2d 1344 (9th Cir. 1975).[34] The rationale for adopting such a "deliberately structured dualism" was the need for local involvement due to the use by traditional cable systems of the public right-of-ways: ". . . local governments are inescapably involved in the process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters, for example, as how best to parcel large urban areas into cable districts." *Id.*, 36 F.C.C.2d at 207.[35] The FCC did not posit any theory in which local jurisdiction would be permitted to intrude upon federal control over inter-

[34]Through passage of the Communications Act of 1934, 47 U.S.C. §§151-712 (1988), Congress reserved to the federal government broad and exclusive authority to regulate interstate communications. Exclusive jurisdiction was asserted over

> all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission . . . .

47 U.S.C. §152(a) (1988). Even prior to the 1984 Act, it was held that Congress intended these "broad responsibilities" to encompass traditional cable television as well as other forms of interstate communications. *United States v. Southwestern Cable*, 392 U.S. 157, 177-78 (1968). The FCC has for almost 50 years preempted local jurisdiction over interstate communications. *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

[35]*See also In re Amendment of Part 76 of the Commission's Rules*, 54 F.C.C.2d 855, 861 (1975) (citation omitted):

> [I]t would be beneficial to clearly delineate those general aspects of cable regulation which we believe are in the province of this agency and those that are the responsibility of non-federal officials. The ultimate dividing line . . . rests on the distinction between reasonable regulations regarding use of the streets and rights of way and the regulation of the operational aspects of cable communications. The former is clearly within the jurisdiction of the states and their political subdivisions. The latter, to the degree exercised, is within the jurisdiction of this Commission. This is so because of the interstate nature of the medium as enunciated by the Supreme Court.

state media such as cable television based on the size or subscriber reach of that interstate media. The cable system definition itself was not mentioned. It merely appeared, with the same two exemptions, in the Appendix. *Id.* at 214.

As the FCC sought to protect local broadcasting service from the competitive inroads of cable television, local franchising authorities were actively protecting local cable service, whose revenues they shared, from the competitive challenges posed by new technologies. The nexus for such local regulatory authority was examined in the *Orth-O-Vision* and *ESCOM* cases. *Orth-O-Vision* dealt with MATV systems interconnected with MDS systems; *ESCOM* dealt with MATV systems interconnected with satellite dish technology ("SMATV").

In *Orth-O-Vision*, the FCC preempted local franchising regulation of MDS systems which installed no facilities in public rights-of-way and which were essential to the development of an interstate MDS network on a national scale. The FCC precluded the state agency from defining MDS-fed MATV systems as cable systems necessitating compliance with franchising requirements since any assertion of local jurisdiction over MATV systems forming an "integral" part of a "federally-regulated" portion of the interstate communications network" constituted "impermissible interference with interstate communications." 69 F.C.C.2d at 665-69.[36]

The FCC drew no distinction between a MDS-fed MATV system serving residents of commonly-owned as opposed to separately-owned multiunit dwellings for purposes of local regulation. Thus, the nature of the ownership or management of the property served was not the

[36]The state agency freely admitted its directive requiring those MATV systems receiving MDS signals to obtain a franchise was adopted to terminate such service in order to favor the development of cable systems. *Id.* at 662-63.

nexus chosen by the FCC to classify which MDS-fed MATV systems would be subject to local controls as cable systems. The nexus was whether the particular communications medium at issue was an *interstate* service which did *not* fit within the *single* exception to the FCC's retention of exclusive jurisdiction over all interstate media, *i.e.*, the placement of facilities necessary for the transmission of such interstate signals in the public rights-of-way.

In *ESCOM*, the FCC preempted local entry regulation of receive-only satellite antennas interconnected by wire with MATV systems in order to serve multiunit dwellings, as long as no public rights-of-way were used. The FCC rejected the argument that SMATV systems should be subject to the same dual regulatory approach applicable to traditional cable, despite the similarity between the two industries with respect to their use of *wired* technology:

> . . . [T] he Commission established this duality [with respect to traditional franchised cable television] *as a policy decision, rather than as a matter of law, based on franchised cable's use of the public streets and rights-of-way and the particular local interests considered applicable to a cable operator, generally chosen to serve the community as a whole.*

95 F.C.C.2d at 1234 (emphasis added).

The FCC reaffirmed the distinction it previously drew "between reasonable regulations regarding use of the public rights-of-way and the regulation of the operational aspects of cable communications," *Amendment of Part 76*, 54 F.C.C.2d at 861, reserving to itself regulation of the latter and permitting local entry regulation only in regard to use of the public domain. *ESCOM*, 95 F.C.C.2d at 1235. The FCC refused to permit local jurisdiction over such SMATV systems because of the threat such regulation posed to the federal government's own statutory mandate to advance the entry of diverse *interstate* media:

> State or local government regulatory control over, or interference with, a federally licensed or authorized interstate communications service, intentionally or incidentally resulting in the suppression of that service in order to advance a service favored by the state, is neither consistent with the Commission's goal of developing a nationwide scheme of telecommunications nor with the Supremacy Clause of the Constitution.

Id. at 1233.

The government interest in refusing to allow localities to treat SMATV systems as cable systems was to insure the free flow of nationwide interstate satellite signals.[37] Consistent with the FCC's decision concerning MDS systems, the FCC refused to permit local jurisdiction over *interstate* media which did not fit within the single exception to such exclusive federal control, *i.e.*, use of the public rights-of-ways. It is also crystal clear that the FCC's rationale for *retaining* exclusive jurisdiction over SMATV systems, *i.e.*, the protection of the FCC's open sky policy aimed at developing as many receive points as possible for the receipt of satellite signals, is substantially different from the FCC's rationale for *exempting MATV* systems from *federal* regulation, *i.e.*, a finding that regulation was unnecessary since no threat was posed to local broadcast service.

Upon judicial review of the *ESCOM* ruling *post-passage*

[37] *Id.* at 1230-1231 ("the unfettered development of interstate transmission of satellite signals, obviously dependent upon facilities for their reception is a federal concern of increasing significance to the public at large"); ("perceived public interest values associated with competitive, unregulated entry into the earth station ownership field"); ("avoidance of barriers to satellite reception . . . caused by state or local licensing or economic regulation of earth station receivers is a matter that will be of growing importance"); ("Commission has pursued open entry policies in the satellite field for the purpose of creating a more diverse and competitive telecommunications environment").

of the 1984 Act, the petitioners argued that the preemption of local franchising over MDS systems had no relevance to the FCC's decision to preempt local franchising over SMATV systems because of the technological differences between MDS, a "wireless" technology, and SMATV or traditional franchised cable, "wired" technologies. The D.C. Circuit rejected that contention by focusing on the "one critical" distinction between MDS and traditional franchised cable: MDS "is operated solely on private property and makes no use of public rights-of-way." *Id.* The D.C. Circuit found *no* pertinent distinction between MDS and SMATV, since both are operated wholly on private property, and in effect found that preemption of the former required preemption of the latter: "The Commission's preemption of [MDS], which, like the system involved in this appeal, does not use public rights-of-way, plainly refutes [the] contention that the Commission has arbitrarily reversed well-established policy." *Id.* at 811.

The exercise of exclusive federal jurisdiction turned not on the type of technology involved, *i.e.*, wired versus wireless, nor on the particular ownership or management of the buildings served, but rather on the wholly *interstate* nature of the particular communications medium at issue and the inapplicability to it of the "use of the public rights of way exception". *NYSCCT,* 749 F.2d at 808-09 (emphasizing "critical distinction the Commission has made between cable television systems that use public rights-of-way and systems, like SMATV, that are operated wholly on private property").

The FCC's pre-1984 Act policy with respect to local regulation of SMATV facilities begins and ends with *ESCOM* just as its pre-1984 Act policy with respect to local regulation of MMDS facilities begins and ends with *Orth-O-Vision.* Yet unlike *Orth-O-Vision* in which the FCC was silent concerning any decision to distinguish

between MDS systems serving commonly-owned versus separately-owned multiunit dwellings for regulatory purposes, the FCC in *ESCOM* specifically raised a question concerning this distinction, but refused to answer it.[38] The FCC was completely silent as to what basis might exist for distinguishing between SMATV systems serving commonly-owned versus separately-owned multiunit dwellings for regulatory purposes. Neither uses a public right-of-way for the delivery of interstate signals. Both advance the same federal interest in "the unfettered development of interstate transmission of satellite signals". *ESCOM,* 95 F.C.C.2d at 1230. Before the FCC could reach that question, the 1984 Act was passed.

Congress undoubtedly adopted the "deliberately structured dualism" developed by the FCC, including the FCC's decision to delegate regulation to local authorities only to the extent such regulation was related to usage of public rights-of-way. Congress repeatedly referenced traditional cable's use of the public rights-of-way as the sole nexus for permitting any degree of local regulatory jurisdiction over an interstate medium of communications.[39] The Senate Report quoted the FCC in concluding that the "ultimate dividing line" between federal and local jurisdiction "rests on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects

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[38] *ESCOM,* 95 F.C.C.2d at 1224, n.3 (equating *SMATV* with *MATV* for application of the heretofore MATV-only "commonly-owned" exemption and excluding from consideration in its preemption decision those SMATV systems interconnecting separately-owned multiunit dwellings by wire). Essentially, the FCC declined to issue a preemption decision beyond the facts of *ESCOM* which involved a SMATV system serving a single multiunit dwelling.

[39] There is absolutely no indication in the statutory language or legislative history of the 1984 Act that Congress subjected traditional cable systems to local regulation because of their system size as opposed to their use of the public domain.

of cable communications." S.Rep. No. 67 at 7, *quoting Amendment of Part 76*, 54 F.C.C.2d at 861. "The premise for the exercise of . . . local jurisdiction continues to be its use of local streets and rights of way." S.Rep. at 7. And the House Report stated that a facility serving multiple unit dwellings was exempt from local franchising, unless "such facility or facilities use a public right-of-way," H. Rep. No. 934 at 44, *reprinted in* 1984 U.S. Code & Admin. News at 4681, without regard to commonality of property ownership.[40] Even the discriminatory classification at issue here was edited by Congress to *add* the phrase "unless such facility or facilities uses any public right-of-way" to the FCC's existing "commonly-owned" exemption.

Until it agreed in conclusory fashion with Chief Judge Mikva's reasoning as set forth in his concurring opinion below, the FCC had never articulated a basis for its distinction between MATV systems serving commonly-owned as opposed to separately-owned dwellings or the engrafting of that classification upon the wholly new SMATV industry. Congress has never articulated a basis for retaining this same discriminatory classification in the 1984 Act. The "system size" rationale currently advanced by the Government was expressly rejected by Congress as a regulatory tool. The discrimination between

[40] The floor statements of individual members echo these conclusions. Senator Hollings, the ranking minority member of the Senate Commerce Committee, which oversaw the bill, stated in the floor debate: "No one can doubt that localities should be able to exert some control over cable because it crosses public rights of way." 84 Cong. Rec. S8320 (daily ed. July 14, 1983). Senator Packwood, the Committee's chairman observed: "Traditionally, the position of this country has been that local governments have no right to regulate communications. Cable is a form of communications. But for the sole reason that they have to string a wire, the Federal Government initially made a decision that they could regulate cable." 84 Cong. Rec. at S8314 (daily ed. June 14, 1983).

these two types of SMATV operators is arbitrary and irrational. Both are wholly interstate in nature and serve the same function of promoting the federal interest in the free flow of nationwide interstate satellite signals. Both can do so without use of the public rights-of-way.

Respondents submit that Congress did not realize it was establishing a discriminatory classification. Because the SMATV industry was in its infancy and because the *ESCOM* decision had only recently been issued, Congress likely was unaware that SMATV operators, ***unlike MATV*** systems, interconnected separately-owned dwellings by wire and yet remained wholly on private property in doing so. The FCC had not yet focused on the burgeoning SMATV industry; no comprehensive policy or rules existed for Congress' edification at that time. While the discriminatory classification does contain the phrase "under common ownership, control or management," the addition of the clause "unless such facility or facilities uses any public right-of-way" indicates Congress only meant to regulate as cable systems those interstate facilities using public property and unwittingly caught a different kind of fish in the regulatory net.[41]

[41] This is borne out by the FCC's own construction of the cable system definition immediately after passage of the 1984 Act. The FCC determined that *no* discrimination between SMATV facilities serving commonly-owned versus separately-owned buildings had been established by §602(6). *See supra* at 2-3.

V. ASSUMING ARGUENDO THAT CONGRESS' PURPOSE WAS TO ENSURE REGULATION OF LARGER SMATV FACILITIES, THE DISCRIMINATORY CLASSIFICATION IS NOT NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENTAL INTEREST NOT IS IT RATIONALLY RELATED TO THE PURPORTED GOAL.

A. Congress Could Not Have Plausibly Assumed That SMATV Systems Would Remain Of Smaller Size If A Franchise Requirement Were Imposed On Systems Seeking To Interconnect Separately Owned Buildings By Wire.

The Government posits that the discriminatory franchising classification "imposes a relative constraint upon the size of the market being served by the relevant SMATV facilities." Br. at 20. Yet this is contradicted by the very statutory scheme the Government seeks to uphold. First, under §602(6), a SMATV operator is entitled to install a separate satellite headend facility on the premises of each multiunit dwelling it seeks to serve without obtaining a franchise. In this "multidish" fashion, a SMATV operator can service the same number of separately-owned multiunit dwellings that could be serviced by the *same* operator via a coaxial cable interconnection. All the classification achieves is to increase costs which are passed on to consumers – hardly in their welfare.

Second, under §602(6), a SMATV operator is entitled to interconnect separately-owned multiunit dwellings by means of an "infrared link" without obtaining a franchise. *See* J.A. at 22-25. An infrared link involves a very low frequency microwave transmission that "hops" signals across a short distance of up to several feet. Again, through installation of infrared links, the "size of the market being served" by a SMATV operator will be identical to the market size of that *same* operator were a cable interconnection to be employed.

In light of these undisputed "legislative facts", Congress could not logically have presumed that its classification would in fact "impose a relative constraint" on the market share of SMATV operators. The classification simply does not achieve Congress' alleged purpose of subjecting all those SMATV systems of an unspecified and uncontrolled larger size to a franchising requirement for the alleged purpose of consumer protection.[42]

B. Consumers Have As Much Leverage Over Landlords Owning More Than One Building As They Do Over Landlords Owning Only One Building.

The Government claims it is reasonable to presume that the common ownership requirement "enhances" subscriber "leverage" because "all of the consumers will be able to use their status as unit owners or tenants to bring common pressure to bear on a single set of owners or managers who provide or purchase all of a facility's service." Br. at 20. This presumption defies common sense. Each resident has a single owner or manager to complain to concerning the services provided in that resident's building, regardless of whether that owner or man-

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[42] At this juncture, two other means have been authorized by the FCC for SMATV operator distribution of multichannel video programming to separately-owned multiunit dwellings. *See Amendment of Part 94*, 6 F.C.C. Rcd. at 1270 (SMATV operators may now use the 73 channels in the 18 GHz band for the delivery of video entertainment material without obtaining a local franchise, thereby serving an unlimited number of separately-owned multiunit dwellings from a single transmission point); *Telephone Company-Cable Television Cross-Ownership Rules*, 7 F.C.C. Rcd. 300 (1991), *recon.*, 7 F.C.C. Rcd. 5069 (1992) (authorizing tariffed common carrier service in which video program distributors lease channel capacity over optical fiber lines installed throughout the telephone company's local service area with no franchise obligation imposed upon channel lessees, thereby permitting interconnection of separately-owned multiunit dwellings from a single satellite headend facility through use of telephone lines even though SMATV operator cannot use its *own* coaxial cable to do so).

ager has ownership or managerial responsibility for additional buildings. Why an individual or group of tenants would have more control over a landlord owning a number of buildings than over a landlord owning a single building is left unexplained by the Government. Indeed, a tenant will have greater influence over a landlord owning but a single building than over a group building owner since the tenant's voice is less diluted. In short, whatever control the tenant possesses over the landlord or manager is simply unrelated to and unaffected by how large the SMATV operator is who services the property.

In turn, it is the owner of the particular property who determines whether a SMATV operator will be awarded a service contract over its competitors. An owner of a single building can exert as much control, for example, over the programming services offered, the subscriber rates charged, the quality of installation and degree of customer service provided as the owner of two commonly-owned buildings. A landlord has great bargaining power since a SMATV operator has no right to provide its video services to residents at all absent the permission of the property owner. Clearly, the landlord has an incentive to insure that tenants' needs are met by the SMATV operator since to do otherwise contributes to reduced occupancy and rental revenues. Should the SMATV operator fail to honor its contractual promises, owners possess the most effective consumer remedy available – expulsion from the building and renegotiation in the marketplace for a substitute provider.

Because a SMATV operator enters into separate individual contracts for each property served, the fact that those properties collectively are commonly- or separately-owned is irrelevant to the degree of control exercised by each separate landowner. The termination of a service contract by one landowner does not affect the continuation of another landowner's service contract. Thus, the

market size of a particular SMATV operator neither increases nor decreases the amount of leverage that any particular landowner might possess over such operator. That landowner can terminate the SMATV operator's access whether the property is serviced via a coaxial cable interconnection from another separately-owned building or by installation of an 18 GHz receiver or by an independent free standing satellite headend facility.

VI. SHOULD THE DISCRIMINATORY CLASSIFICATION BETWEEN SMATV FACILITIES PASS CONSTITUTIONAL MUSTER, THEN THIS COURT SHOULD RULE THAT §602(6) UNLAWFULLY DISCRIMINATES BETWEEN WIRED AND WIRELESS TECHNOLOGIES SERVING SEPARATELY-OWNED MULTIUNIT DWELLINGS.

The Government asserts without analysis that Congress discriminated between those video providers interconnecting separately-owned multiunit dwellings by wire versus wireless in order to provide an "incentive" to wired technologies to "switch" to wireless technologies. Br. at 28, n.23. As set forth by Respondents in their Br. in Opp. at 17-18, this justification flies in the face of "certain basic facts" that have dictated decades of congressional and administrative policy with respect to communications, foremost of which is that "the radio spectrum simply is not large enough to accommodate everybody." *National Broadcasting Co. v. United States,* 319 U.S. at 213. Respondents find it inconceivable that Congress crafted the cable system definition with the express purpose of encouraging traditional cable system operators to abandon their invested plant and migrate to wireless spectrum, especially when MDS spectrum, for example, provides a maximum of 33 channels. The discrimination between wired and wireless technologies serving separately-owned dwellings without use of the public rights-of-way is wholly irrational.

VII. THE COURT OF APPEALS ADHERED TO THIS COURT'S PRECEDENTS IN REJECTING THE RATIONALITY OF §602(6).

This Court has not abdicated its role in insuring that legislative classifications are premised upon a real rather than a feigned difference between two groups. To do otherwise endorses the exercise of raw power by the majority, and clothes naked preferences in the generalized garb of public welfare. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

As set forth above, there is no dissimilarity between SMATV operators located wholly on private property which seek to serve separately-owned as opposed to commonly-owned multiunit dwellings by wire. Nor is there any dissimilarity between wired and wireless video distributors who serve separately-owned multiunit dwellings. Perhaps this is why the Government challenges the process used by the lower court in rendering its decision more than it challenges the result.[43]

That process, however, correctly sought to uncover all "legislative facts on which the classification is apparently based." *Vance v. Bradley*, 440 U.S. 93 (1979).[44] *See* App.

[43] Regardless of the precise rationality review that might have been engaged in by the court of appeals, the result remains the same since the Government still has not articulated a conceivable basis for the discriminatory classification.

[44] The "discriminatory classification" upheld in *Vance* is not particularly instructive here. Congress distinguished between Foreign Service and Civil Service personnel in establishing a mandatory retirement age, not as between Foreign Service personnel. Here, Congress not only classified SMATV operators differently from MDS operators but also classified certain SMATV operators differently than other SMATV operators, apparently solely on the basis of the ownership of the real estate which such operators may serve. *See generally Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (overturning a classification distinguishing not [footnote continued]

at 36a. While the Government insists that the remand to the FCC, *in which even the dissenting judge concurred*, evidences a demand by the court of appeals for more than a "conceivable basis" that might justify the discriminatory classification, the very posture of the case compelled such a result and demonstrates a deferential move by the court to insure that the FCC had had a full opportunity to defend the challenged classification. Far from requiring "empirical proof" or an "articulated basis" in the record, the FCC was simply charged with a responsiblity to explain to the extent it could what "state of facts reasonably may be conceived to justify" the discriminatory classification.[45] Given the FCC's expert knowledge of the various multichannel video distributors at issue, how each operates and their relationship to one another, the court of appeals rightly assumed that if such a "state of facts" could be "conceived," the FCC was in the best position to do so, especially since the exemption at issue had been part of the FCC's own cable system definition prior to any congressional action. "The State must do more than justify its classification with a concise expression of an intention to discriminate." *Plyler v. Doe*, 457 U.S. 202, 227 (1982).

The lower court found the legislative history of the 1984 Act and FCC regulatory policy replete with references to the public rights-of-way rationale as the basis for local jurisdiction over interstate media and no reasoning

only between resident veterans and non-veteran residents, but also between resident veterans, solely on the basis of when such veterans moved into the state); *Zobel v. Williams*, 457 U.S. 55 (1982).

[45] *Sullivan v. Stroop*, 496 U.S. 478, 485 (1990), quoting *Bowen v. Gilliard*, 483 U.S. 587, 601 (1987). *But see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (law must "rationally further[ ] some legitimate, articulated state purpose"); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (law must rationally further "the purposes identified by the State").

as to how the discriminatory classification rationally furthered that interest. With respect to preemption of local regulation over SMATV facilities in particular, both the legislative history of the 1984 Act and FCC regulatory policy are silent concerning how the discriminatory classification furthers, rather than detracts, from the federal interest in the "unfettered development of interstate transmission of satellite signals."[46] In searching for a different governmental interest sought to be advanced by the classification, the court of appeals was met with assertions by the FCC that it agreed entirely with the public rights-of-way rationale but was hampered by "the unambiguous language of the statute." J.A. at 51a.[47] Clearly, the court

[46] "System size" was specifically *rejected* by Congress as a means to determine which interstate media were to be treated as cable systems, and was not the basis for the FCC's retention of exclusive jurisdiction over SMATV facilities serving commonly-owned multiunit dwellings.

[47] The FCC refused to describe for the court of appeals either what dissimilarities or similarities *could* be conceived to exist as between (1) the exempt and nonexempt video distribution facilities and (2) traditional cable systems, so as to justify local regulation of some but not all on a basis other than the historical public right-of-way rationale. Thus, the court was correct in concluding that the possible basis posited by Chief Judge Mikva, *i.e.*, "the impression of 'similarity' " between traditional cable systems and external, quasi-private SMATV facilities (necessarily assuming incorrectly a dissimilarity between traditional cable systems and either wholly private SMATV facilities or internal facilities) "is just that: a naked intuition, unsupported by conceivable facts or policies [citation omitted]." App. at 4a. *City of Cleburne*, 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). *See also Plyler*, 457 U.S. at 228-30 (evidence of record demonstrated chosen means "ineffectual attempt" to further stated goal). *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 537 (1973) (overturning on equal protection grounds a legislative classification the practical effect of which did not operate rationally to further the stated government interest because the classification could be avoided by those whom the government intended to exclude from benefits by the classification.)

of appeals did not depart from this Court's precedents in determining that this case represented one of the rare instances in which Congress had engaged in a "wholly arbitrary act" in its classification scheme. *City of New Orleans v. Dukes*, 427 U.S. 297, 304 (1976) (per curiam).

This is not legislation which is merely "unwise" or "unartfully drawn". *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980). This is not legislation in which inequalities result from "transitional delay," but rather from a long-standing grossly overinclusive and underinclusive classification neither narrowly tailored to serve a compelling governmental interest nor rationally related to a legitimate federal goal. *See Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989). The court of appeals, consistent with this Court's precedents, simply refused to permit the rational-basis test to be deprived of all meaning, to become merely a "toothless" standard.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed. Since that judgment preceded passage of the 1992 Act, which exacerbates the discriminatory impact of the classification, and since there is no rational basis for the classification, Respondents request that this Court further declare that the burdens imposed on cable systems by the 1992 Act do not apply to SMATV systems interconnecting separately owned multiunit dwellings by wire. To the extent this Court finds that the record does not permit it to determine the validity of some or all of the restrictions contained in the 1992 Act, the case should be remanded to the court of appeals to permit Respondents to challenge the discriminatory classificaton based on the addi-

tional burdens imposed in the 1992 Act. *Diffenderfer*, 404 U.S. at 415; *Bryan v. Austin*, 354 U.S. 933 (1957).

In the alternative, Respondents request that this Court declare that Congress has adopted the result of the lower court's decision as to the franchising requirement and as to the burdens imposed by the 1992 Act.

Respectfully submitted,

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February 22, 1993

No. 92-603

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

BEACH COMMUNICATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents [1] devote much of their brief to issues that are, at most, tangentially related to the question presented—whether Congress had a rational basis for distinguishing between facilities serving commonly owned, as opposed to separately owned, multiple-unit dwellings in defining the term "cable system." 47

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[1] References in this brief to "respondents" and "Resp. Br." encompass Beach Communications, Inc., Maxtel Limited Partnership, Pacific Cablevision, and Western Cable Communications, Inc., but not respondent National Cable Television Association, Inc., which has filed a brief in support of petitioners.

U.S.C. 522(6) (1988).[2] As discussed in our opening brief (Gov't Br. 16), that question turns on whether "any state of facts reasonably may be conceived" to justify the classification (*Sullivan* v. *Stroop*, 496 U.S. 478, 485 (1990))—an issue that respondents do not directly address until page 42 of their brief.[3] Because the proper application of that standard of review is central to the correct disposition of the question presented, however, we address respondents' treatment of that matter first.

1. a. Respondents do not explicitly dispute that the rational basis for a statute need not appear in either a legislative or administrative record; rather, they contend (Resp. Br. 46-47) that the court of appeals adhered to that principle in this case. As we explain in our opening brief (Gov't Br. 26-29), however, the

[2] As we note in our opening brief (Gov't Br. 2 n.1), the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(c)(4), 106 Stat. 1463, renumbered subsection (6) of 47 U.S.C. 522 as subsection (7). For convenience, we refer to the version in effect when the court of appeals issued its decision in this case.

[3] Respondents instead begin with (Resp. Br. 8-12) an imaginative, but unavailing, argument that Congress acquiesced in the nonfinal, lower court opinion in this case by not responding to it in the Cable Television Consumer Protection and Competition Act of 1992 Pub. L. No. 102-385, 106 Stat. 1460. They then claim (Resp. Br. 12-17) that this Court should pretermit the question presented in favor of a strict scrutiny analysis never passed on by the court below. From there, respondents devote (Resp. Br. 17-41) a great many pages to the claim that in enacting the Cable Communications Policy Act of 1984 (Cable Act), Pub. L. No. 98-549, 98 Stat. 2779, the 98th Congress could not really have intended to use the "common ownership" requirement as a rule-of-thumb for identifying smaller facilities less in need of, and less able to absorb, regulation. We address those arguments below.

record belies that claim. Even if respondents' position were consistent with the court of appeals' original decision—which held that "[*o*]*n the record before us*, we fail to see a 'rational basis' " for the classification (Pet. App. 34a (emphasis added))—it cannot be reconciled with the court's decision following the remand to the FCC. As discussed in our opening brief (Gov't Br. 27-29), the court refused to credit plausible facts hypothesized by Chief Judge Mikva (Pet. App. 42a-43a) in his opinion concurring in the remand because the court had "no basis for assuming th[em]." *Id.* at 4a. Further, the court would not consider other justifications because the FCC failed to "flesh [them] out" on remand. *Ibid.* The court's refusal to consider plausible justifications because they were unverified on a judicial or administrative record is flatly at odds with this Court's rational-basis decisions. See, *e.g.*, *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1938) ("the existence of facts supporting the legislative judgment is to be presumed"); *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979) (court may not reject legislative judgment on the ground that there are not "convincing statistics in the record").

Respondents suggest (Resp. Br. 47-48), moreover, that the legislative history of the Cable Communications Policy Act of 1984 (Cable Act), Pub. L. No. 98-549, 98 Stat. 2779, and FCC regulatory policy (a) identify the use of public rights-of-way as the basis for local jurisdiction over cable facilities, and (b) favor unfettered development of interstate satellite communications. Respondents then argue (Resp. Br. 48) that Section 522(6) is irrational because it does not further those precise interests. Under the rational-basis test, however, a statute need not be justified in

terms of purposes articulated in the legislative history. See *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980) ("this Court has never insisted that a legislative body articulate its reasons for enacting a statute"); *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960) (finding it "constitutionally irrelevant" whether rational reasons for a classification "in fact underlay the legislative decision"). Nor has this Court ever held that a statute is irrational because an administrative agency has expressed a policy preference different from the one reflected in the statute.

b. Respondents argue (Resp. Br. 42-45) that the "consumer welfare" rationale advanced by Chief Judge Mikva (Pet. App. 43a) and seconded by the FCC (*id.* at 50a) does not support the "common ownership" requirement in Section 522(6). They claim (Resp. Br. 42) that the "common ownership" requirement does not, in practice, constrain the subscriber base of a Satellite Master Antenna Television (SMATV) facility, because a SMATV operator may "install a separate satellite headend facility on the premises of each multiunit dwelling it seeks to serve without obtaining a franchise."[4] For reasons discussed in our opening brief (Gov't Br. 24 n.21), that very consideration *does* support the "consumer welfare" rationale. If a SMATV facility cannot serve separately owned buildings without incurring the cost of installing a separate satellite antenna on each building, it becomes more expensive for a

[4] As the FCC made clear in its rulemaking in this case, "the use of wire or cable within the confines of a multi-unit building is not sufficient to bring the service within the jurisdictional bounds of a 'cable' system." *In re Definition of a Cable Television System*, 5 F.C.C. Rcd. 7638, 7640 (1990).

SMATV operator to serve a large market of separately owned buildings without triggering the statutory franchise requirement of 47 U.S.C. 541(b)(1988).[5]

Respondents next contend (Resp. Br. 43-45) that there is no reason to think that consumers will have more leverage over their cable provider if they all live in dwellings under common ownership, control, or management. In general, however, it is plausible to think that when the "common ownership" requirement is met, the SMATV service is being provided to a smaller group of subscribers by a single owner, who offers it as an amenity to his tenants. Because the group of subscribers is apt to be smaller,[6] and the owner has a strong economic interest in retaining his tenants for reasons quite apart from the provision of SMATV services, it is plausible to assume that owner-supplied SMATV services will tend to be more responsive to the demands of consumers. By contrast, if a SMATV facility serves several separately owned buildings, it is more likely that the facility will be run in the nature of an independent business by the outside operator. In light of these considerations, Congress could reasonably conclude

[5] By contrast, the "common ownership" places an intrinsic constraint on the size of a facility. If a SMATV facility expands to serve dwellings not under the same ownership, that action will itself trigger the franchise requirement.

[6] We recognize, of course, that there will be instances in which some separately owned buildings will constitute a smaller market than some commonly owned buildings. However, as discussed in our opening brief (Gov't Br. 25), a statute may satisfy rationality review even if it is "to some extent both underinclusive and overinclusive." *Vance* v. *Bradley*, 440 U.S. at 108.

not only that there is less need to regulate facilities that meet the "common ownership" requirement, but also (and concomitantly) that the costs of complying with franchise requirements would result in an undue burden upon smaller facilities who have few subscribers among whom they spread the compliance costs.

In short, respondents' submission suggests no more than that there may be room for disagreement about the precise effects of the "common ownership" requirement upon consumer welfare. What is critical, however, is that under the rational-basis test, "[d]ifferences of opinion" about "the wisdom, need, or appropriateness" of legislation "suggest a choice which should be left where * * * it was left by the Constitution—to the States and to Congress." *Olsen* v. *Nebraska ex rel. Western Reference & Bond Ass'n*, 313 U.S. 236, 246 (1941) (internal quotation marks omitted).[7]

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[7] Respondents also contend (Resp. Br. 26-29, 42) that the "consumer welfare" rationale cannot be sustained because Section 522(6) generally exempts facilities using nonphysical transmission media, irrespective of the size of their subscriber base. As explained in our opening brief (Gov't Br. 28 n.23), the court of appeals adverted to that issue in its first decision (Pet. App. 34a-36a), but declined to reach it following the remand. Pet. App. 3a. It is the usual practice of this Court not to decide questions left unresolved by the courts below, leaving them for the lower courts to address in the first instance on remand. See, *e.g.*, *Masson* v. *New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2437 (1991); *Martin* v. *OSHRC*, 111 S. Ct. 1171, 1180 (1991); *Sullivan* v. *Everhart*, 494 U.S. 83, 95 (1990) (due process claims); see also *Leathers* v. *Medlock*, 111 S. Ct. 1438, 1447 (1991) (reversing state supreme court decision invalidating tax on First Amendment grounds and then remanding case to state supreme court to consider equal protection claim left open below).

In any case, respondents err in arguing (Resp. Br. 27) that Congress's exemption of wireless facilities negates the "consumer welfare" rationale as applied to physically interconnected SMATV facilities; Congress could rationally have concluded that the public interest in promoting wireless technologies outweighed the potential harm of leaving wireless systems unregulated. See Gov't Br. 28 n.23.

2. a. Because Congress in 1984 eliminated the 50-subscriber exemption and similar small subscribership exemptions, respondents maintain (Resp. Br. 22) that it is "inconceivable" that Congress meant to use the "private cable" exemption as a rule-of-thumb to identify smaller cable facilities less in need of regulation.[8]

Respondents' contention is unavailing under settled rational-basis case law. Their argument reduces to the proposition that Congress's actual reason for retaining the "private cable" exemption could not have been to exclude smaller facilities from the regulatory scheme, because that rationale would be inconsistent with Congress's action eliminating the explicit nu-

[8] Prior to the Cable Act, the FCC's cable regulations generally exempted cable facilities serving fewer than 50 subscribers (see 47 C.F.R. 76.5(a)(1) (1983)) and selectively exempted facilities from specific regulatory requirements on the basis of the number of subscribers. See, *e.g.*, 47 C.F.R. 76.67(f) (1983) (exempting systems with fewer than 1000 subscribers from sports blackout rules); 47 C.F.R. 76.95(b) (1983) (providing that rules requiring nonduplication of network programming within a market do not apply to cable systems serving fewer than 1000 subscribers); 47 C.F.R. 76.305(a) (1983) (record-keeping requirements apply only to cable systems with 1000 or more subscribers); 47 C.F.R. 76.601(f) (1983) (exempting systems under 1000 subscribers from certain technical standards).

merical exemptions. Applying the rational-basis test, however, is not an exercise in determining the actual intent of the legislature that enacted a law. "Where * * * there are plausible reasons for Congress' action, [judicial] inquiry is at an end," and [i]t is * * * 'constitutionally *irrelevant* whether this reasoning in fact underlay the legislative decision.'" *Fritz*, 449 U.S. at 179 (quoting *Flemming* v. *Nestor*, 363 U.S. at 612) (emphasis added). Thus, for present purposes, the actual reason the 98th Congress retained the "private cable" exemption is immaterial; what is crucial is that a state of facts—in this case, relating to consumer welfare—"reasonably may be conceived" to justify the classification at issue. *Sullivan* v. *Stroop*, 496 U.S. at 485.

In any case, we disagree with the inference drawn by respondents with respect to the deletion of the numerical exemptions. As we note in our opening brief (Gov't Br. 22-23), the FCC in 1978 explained that a similar rationale underlay *both* the 50-subscriber exemption and the "private cable" exemptions then contained in its rules. See *Memorandum Opinion & Order in Docket No. 20561*, 67 F.C.C.2d 716, 726 (1978) ("[W]e have focused on subscriber numbers as well as the multiple unit dwelling indicia on the theory that the very small are inefficient to regulate and can safely be ignored in terms of their potential for impact on broadcast service to the public and on multiple unit dwelling facilities on the theory that this effectively establishes certain maximum size limitations."). In view of the partially overlapping purpose of those exemptions, it is at least equally plausible, and far from "inconceivable" (Resp. Br. 22), that Congress deleted the express numerical exemptions in the 1984 Cable Act because the "private cable" exemption would serve as a sufficient basis for exempting small cable facilities. Indeed, given the lengthy history of the numerical exemption for facilities serving fewer than 50 subscribers (see Gov't Br. 5 n.4), and the Commission's targeted use of numerical exemptions from specific regulatory requirements (see note 8, *supra*), it would be surprising if Congress, in enacting the Cable Act, intended to eliminate the substance of any exemption aimed at relieving smaller facilities from regulation.

b. Respondents also maintain (Resp. Br. 23-25) that the FCC's pre-Cable Act "private cable" exemption does not support the rationality of Congress's adoption of that exemption. In particular, they argue that the "private cable" exemption had nothing to do with the size of the facilities exempted, but was designed to exempt Master Antenna Television (MATV) facilities—more passive entities that use rooftop antennae to receive off-the-air programming and supply it to the residents of an apartment building.

For several reasons, respondents' reliance on pre-Cable Act FCC precedent is misplaced. First, this Court has never held that a statute's rationality must be reflected in pre-existing agency precedent. And any such requirement would contravene this Court's precedents holding that a statute's rationality must be sustained if "any state of facts reasonably may be conceived" to justify the statute. *Sullivan* v. *Stroop*, 496 U.S. at 485. Second, although the "private cable" exemption was originally intended to cover MATV facilities, the FCC indicated prior to the passage of the Cable Act that the exemption also applied to SMATV facilities—the very entities at issue here. See *In re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223, 1224 n.3 (1983), aff'd *sub nom. New*

York State Comm'n on Cable Television v. *FCC*, 749 F.2d 804 (D.C. Cir. 1984).

Third, pre-Cable Act precedent supports the factual premises of the "consumer welfare" rationale. In the pertinent decisions, issued in the mid-1970s, the FCC considered whether to limit the "private cable" exemption to facilities serving fewer than 1000 subscribers. *Notice of Proposed Rule Making in Docket No. 20561*, 54 F.C.C.2d 824, 834-835 (1975). In rejecting that proposal, the FCC made clear that the "private cable" exemption was justified, in part, because it tended to describe smaller facilities serving a single apartment house or complex whose management offered MATV service as an amenity to the tenants. See *First Report & Order in Docket No. 20561*, 63 F.C.C.2d 956, 996-997 (1977).[9] There is no reason to question the plausibility of the underly-

[9] In particular, the Commission noted that "only a very small percentage of apartment buildings exceed 500 units in size" and that a MATV provider, in practice, "possesses only the limited economic base represented by the several hundred subscribers within the four walls of a highrise facility." *First Report & Order in Docket No. 20561*, 63 F.C.C.2d at 996. In rejecting a motion for reconsideration, moreover, the FCC emphasized that the "multiple unit dwelling indicia" (which included the "common ownership" requirement, 47 C.F.R. 76.5(a)(2) (1977)) "effectively establishe[d] certain maximum size limitations." *Memorandum Opinion & Order in Docket No. 20561*, 67 F.C.C.2d 716, 726 (1978). Respondents argue (Resp. Br. 26) that it is unclear whether that discussion related only to facilities that served units under common ownership or whether it also might pertain to MATV facilities serving separately owned units. Because the FCC's discussion arose in the context of considering whether to modify an exemption that applied only to facilities serving commonly owned, controlled, or managed multiple-unit dwellings, respondents' contention is unpersuasive.

ing premise of those FCC precedents—as applied to SMATV facilities that satisfy the "common ownership" requirement. When cable service is provided as an amenity by the owner of a single commonly owned building or building complex, it is reasonable to assume that regulation is both less necessary and more burdensome than in the case of traditional cable facilities or SMATV facilities serving separately owned buildings.[10]

3. Respondents claim (Resp. Br. 33-39) that, in any event, the more relevant pre-Cable Act FCC

[10] The 1977 amendment of the FCC rules also supports the "consumer welfare" requirement in another respect. Beginning in 1972, a cable system could not obtain a "certificate of compliance" necessary to commence operations unless the system had a local franchise that met federal specifications. See *Cable Television Report & Order*, 36 F.C.C.2d 143, 219 (1972) (local franchise requirements included public inquiry into operator's qualifications and construction plans; award of franchises of reasonable duration; and provision for consumer complaint procedures). In the 1977 proceeding, the Commission exempted cable systems with fewer than 500 subscribers from its franchise requirements. In so doing, the FCC reasoned not only that franchise obligations were "unduly burdensome for smaller systems," but also that "the combined smallness and localized nature of a system of this size * * * generally [gives] assurance of responsiveness to subscribers' complaints and wishes." *First Report & Order in Docket No. 20561*, 63 F.C.C.2d at 988. Although the Commission soon thereafter eliminated the local franchise requirement altogether (see *Report & Order in CT Docket No. 78-206*, 69 F.C.C.2d 697, 703, 710 (1978) (eliminating "certificate of compliance" requirement); *Report & Order in Docket No. 21002*, 66 F.C.C.2d 380, 391-394 (1977)), the FCC's rationale for the intermediate step of adopting a small-subscriber exemption in 1977 further corroborates the plausibility of the "consumer welfare" rationale for the "private cable" exemption.

precedents were those that preempted local regulation of cable facilities crossing public rights-of-way, while permitting local regulation of cable facilities not crossing public rights-of-way. In respondents' view, those pre-Cable Act precedents suggest that Congress in 1984 actually meant to impose local regulation only upon facilities using public rights-of-way, but "unwittingly caught a different kind of fish in the regulatory net." Resp. Br. 41.

As discussed (see p. 8, *supra*), as long as there are "plausible reasons" (*Fritz*, 449 U.S. at 179) for the distinction at issue, it is inconsequential (for purposes of the Act's constitutionality) whether the Cable Act has effects that Congress may not have specifically contemplated. In any case, we disagree with respondents' assertion that Congress did not intend Section 522(6) to reach facilities that do not cross public rights-of-way, even if they serve separately owned buildings. "Congress' intent is 'best determined by [looking to] the statutory language that it chooses.'" *United States* v. *Monsanto*, 491 U.S. 600, 610 (1989) (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 495 n.13 (1985)). And as the court of appeals correctly held (Pet. App. 20a-21a), in enacting Section 522(6)(B), Congress selected unambiguous language exempting facilities that "serve[] only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management" *and* that forgo "use[] [of] any public right-of-way." 47 U.S.C. 522(6)(B) (1988).[11] Particularly in light

[11] Under respondents' reading of Congress's intent, the "common ownership" requirement would become wholly nugatory, contrary to settled canons of statutory construction. See, *e.g.*, *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955) (courts should "give effect, if possible, to every clause and word of a statute"). Respondents cite (Resp. Br. 39-40) various legislative reports and floor statements to support their contention that public rights-of-way should be the sole determinant of local regulation. But as this Court has emphasized, "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 n.3 (1989).

of the fact that Congress based Section 522(6)(B) upon a well-established regulatory exemption that had long included a "common ownership" requirement (see 47 C.F.R. 76.5(a)(2) (1983)), Congress's retention of that requirement was not, as respondents urge, a mere oversight.

Finally, as we explain in our opening brief (Gov't Br. 36), it is one thing to say that the crossing of public rights-of-way was a traditional justification for local cable franchising, and quite another to conclude (as respondents would) that the crossing of public rights-of-way is the *only* conceivable basis for cable franchising distinctions. While an administrative agency may not depart from its prior precedents under an unchanged statute without giving a reasoned explanation (see *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983)), this Court has never held that Congress must offer any such explanation when it amends its own statutes, much less when it adopts a regulatory approach different from prior administrative practice. As noted in our opening brief (Gov't Br. 37), even aside from the use of public rights-of-way, Congress assuredly has a constitutionally sufficient interest in assigning local authorities power to engage in measures such as rate regulation, consumer

protection, and the like. See, *e.g.*, 47 U.S.C. 543, 552 (1988). In short, even if Congress departed from the FCC's traditional approach to public rights-of-way, such a departure would have no bearing on the rationality of Section 522(6)(B).[12]

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[12] We do not think that Congress in fact departed from FCC precedents. Although respondents emphasize that the FCC preempted local regulation of cable facilities that did not cross public rights-of-way, the Commission *never* preempted local regulation of the subset of SMATV systems that served separately owned buildings by wire. Indeed, when the FCC preempted local regulation of SMATV systems that did not cross public rights-of-way, it was careful to emphasize that only "SMATV systems serving one or more multiple unit dwellings under common ownership, control or management * * * are the subject of this proceeding." *In re Earth Satellite Communications, Inc.* 95 F.C.C.2d 1223, 1224 n.3 (1983), aff'd *sub nom. New York State Comm'n on Cable Television* v. *FCC*, 749 F.2d 804 (D.C. Cir. 1984). Thus, the Commission's pre-Cable Act SMATV precedents simply do not speak to whether the FCC would have preempted local regulation of the SMATV facilities at issue here.

In addition, there is little possibility that Congress assumed that in adopting the "private cable" exemption, it was embracing an exemption that applied whenever a facility did not cross any public rights-of-way. In several decisions in the mid-1970s, the FCC declined to apply the "private cable" exemption even though a cable facility was located entirely on private land and crossed no public rights-of-way. See, *e.g.*, *In re Citizens Dev. Corp.*, 52 F.C.C.2d 1135, 1137 (1975) (private community development); *In re Bayhead Mobile Home Park*, 47 F.C.C.2d 763, 763-764 (1974) (mobile home park located on private land). At the time, moreover, a "cable television system" was required under FCC rules to obtain a franchise before it could obtain a "certificate of compliance" and begin operations. See 47 C.F.R. 76.31(a) (1975); see also 47 C.F.R. 76.11(a) (1975) ("certificate of compliance" requirement). Accordingly, as *Bayhead* illustrates, because the availability *vel non* of the "private cable" exemption could determine a facility's status as a "cable television system," it was directly relevant to whether the franchise requirement applied. See 47 F.C.C.2d at 764-765.

4. Respondents contend (Resp. Br. 8-12) that the issue presented for review is moot because Congress was made aware of the court of appeals' decision, but did nothing to amend Section 522(6) or to defend the "common ownership" requirement when it passed the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.[13] The inference that respondents would have this Court draw from congressional inaction cannot be sustained.

Respondents' contention rests (Resp. Br. 9 n.6) on this Court's precedents holding that when Congress substantially amends a statute without altering a particular provision, that may be evidence of legislative intent to embrace the prevailing judicial interpretation of that provision—particularly if it is "a long-standing and well-known" interpretation. *Ankenbrandt* v. *Richards*, 112 S. Ct. 2206, 2213 (1992); see, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-382 (1982).[14]

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[13] Respondents' argument is not properly labeled a mootness argument in the Article III sense, because there remains a case or controversy over respondents' claim for relief. More precisely, respondents argue that they are entitled to judgment because Congress acquiesced in the lower court decision in this case.

[14] In general, this Court has admonished that congressional inaction "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted).

But the implicit premise of those cases—that in the course of otherwise thoroughly amending a statute Congress would likely alter a settled interpretation with which it disagrees—has no application in the case of a constitutional ruling.

In statutory cases, of course, "Congress may alter what [the courts] have done by amending the statute. In constitutional cases, by contrast, Congress lacks this option, and an incorrect or outdated precedent may be overturned only by [judicial] reconsideration or by constitutional amendment." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989). Because the court of appeals held Section 522(6) unconstitutional on its face, it is difficult to perceive what purpose would have been served by Congress's expressing its disagreement with the court of appeals' opinion. Congress's failure to act therefore cannot give rise to any persuasive inference of acquiescence in the result below.

Respondents argue (Resp. Br. 11 n.8) that Congress should have responded to the court of appeals' decision by "reenact[ing] the current provision and, in the legislative history, articulat[ing] a justification for the exemption at issue, rather than leaving it for the parties and this Court to conceive of one." That argument is inconsistent with this Court's cases applying the rational-basis test. For the reasons discussed (see pp. 3-4, *supra*), Congress had no duty in 1984 or in 1992 to give reasons for the distinction drawn in Section 522(6). And its failure to do so in 1992 cannot, consistently with the rational-basis test, be understood to reflect congressional acquiescence in a nonfinal lower court decision holding Section 522(6) irrational. Indeed, because Congress passed the 1992 Act during the period in which the court of appeals'

ruling remained subject to further review (and after the Solicitor General authorized a petition for a writ of certiorari), it is at least equally plausible to infer that Congress's failure to amend Section 522(6) reflects its *non*acquiescence in the lower court's ruling in this case.

5. Respondents argue (Resp. Br. 12-17) that this Court should apply heightened scrutiny in analyzing whether Section 522(6) satisfies equal protection principles, because the classification at issue affects First Amendment interests. The court of appeals, however, did not reach the issue, because it invalidated Section 522(6) on rational-basis grounds.[15] It is the usual practice of this Court not to consider an issue not passed on by the court of appeals, leaving it for the court of appeals to address the issue in the first instance on remand. See, *e.g.*, cases cited in note 7, *supra*.

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[15] As discussed in our opening brief (Gov't Br. 9 n.12), respondents contended in the court of appeals that applying the Cable Act's franchise requirements to their operations violated the First Amendment, but the court of appeals found that claim unripe. See Pet. App. 25a-31a. At the same time, however, the court concluded that respondents' rational-basis challenge to Section 522(6) was ripe for immediate consideration. Pet. App. 32a-33a. In its initial decision, remanding the case to the FCC to provide a rational basis, the court noted that if the Commission was able to "furnish a 'rational basis,' * * * we will need to consider whether a heightened-scrutiny equal protection challenge is ripe. For now, however, we need not address the 'fundamental rights' claim, because the 'rational basis' claim is ripe and apparently valid." Pet. App. 32a. Because the court invalidated Section 522(6) on rational-basis grounds following the remand, it had no occasion to consider any aspect of respondents' heightened-scrutiny equal protection challenge.

In our view, remanding the case to the court of appeals to consider issues relating to a heightened-scrutiny equal protection claim is the proper course here. In light of its disposition of this case, the court below did not even address the ripeness of the heightened-scrutiny equal protection claim, much less the merits of that claim. In addition, respondents base (Resp. Br. 14-15) much of their claim of ripeness on the effects of the Cable Television Consumer Protection and Competition Act of 1992, which was enacted after the court of appeals issued its decision and was, accordingly, never before the court. In view of the complexity of both the statutory scheme and the constitutional issues relating to the validity of the cable legislation,[16] we believe that issues relating to the appropriateness of heightened scrutiny should be left for consideration, in the first instance, by the court of appeals on remand.[17]

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[16] Many of the provisions of the 1992 Act are currently the subject of challenge in district court. See *Time Warner Entertainment Co., L.P.* v. *FCC*, Civ. No. 92-2494 (D.D.C.). In addition, Congress has specified that any challenge to the "must carry" rules of the 1992 Act (see §§ 4, 5, 106 Stat. 1471-1481)—upon which respondents heavily rely (see Resp. Br. 14)—must be heard in a three-judge district court convened pursuant to 28 U.S.C. 2284. § 23, 106 Stat. 1500. Presently, an action challenging the "must carry" rules is pending in a three-judge district court in the District of Columbia. See *Turner Broadcasting System, Inc.* v. *FCC*, Civ. No. 92-2247 (D.D.C.). The pendency of those actions makes it particularly inappropriate to entertain respondents' claims relating to the 1992 Act in the first instance in this Court.

[17] We believe that it is inappropriate to apply heightened scrutiny to test the validity of the classification between cable facilities serving commonly owned, rather than separately owned, buildings. As this Court recently held, when a statute assigns distinct burdens to different First Amendment speakers, there are three types of concerns that trigger First Amendment scrutiny. See *Leathers* v. *Medlock*, 111 S. Ct. 1438, 1442-1445 (1991). First, if the statute singles out the press for a burden not shared by nonmedia organizations, the classification is suspect. *Id.* at 1443-1444. That concern is not implicated by respondents' claim that the Cable Act impermissibly distinguishes between different categories of cable operators. Second, if a statute singles out a small number of speakers for the imposition of a burden, the statute is suspect because of the "danger of censorship." *Id.* at 1444. The facilities run by respondents, however, are subject to the same burdens shared by all traditional cable operators, thus eliminating any danger of a "narrow targeting" (*id.* at 1443) of certain speakers. Third, if the disparate burden is imposed because of the content of the speaker's speech, then the classification is constitutionally suspect. *Ibid.*; see *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92 (1972) (allowing picketing only for labor disputes); *Carey* v. *Brown*, 447 U.S. 455 (1980) (same). Because nothing in the record suggests that the material communicated by SMATV facilities serving commonly owned buildings "differs systematically in its message" (*Leathers*, 111 S. Ct. at 1445) from the material communicated by facilities serving separately owned buildings, content-based discrimination is not an issue here. Thus, even if we assume that the First Amendment protections for speakers fully apply to respondents here, there is no reason to apply heightened scrutiny under the equal protection component of the Due Process Clause, because the classification at issue would not be suspect under the First Amendment. Cf. *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2543 n.4 (1992).

* * * * *

For the foregoing reasons and those given in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

WILLIAM C. BRYSON
Acting Solicitor General

MARCH 1993

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No. 92-603

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

UNITED STATES OF AMERICA and
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Petitioners,

v.

BEACH COMMUNICATIONS, INC., *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Cable Communications Policy Act of 1984 exempts from coverage facilities that serve "only subscribers in 1 or more multiple unit dwellings under common ownership, control or management, unless such facility or facilities use[] any public right-of-way." 47 U.S.C. § 522(6). The question presented is whether the resulting regulatory distinction between facilities serving separately rather than commonly owned, controlled, or managed buildings is rationally related to a legitimate government purpose under the Due Process Clause of the Fifth Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments, including issues of state and local legislative and regulatory authority.

While cities and States are the primary regulators of cable television and related technologies and for that reason have an evident interest in the impact of this case on the scope of their authority to regulate SMATV facilities, *amici* have at least as great an interest in the manner in which the federal courts conduct review of regulatory legislation. *Amici* submit that the analysis of the court of appeals reflects a fundamentally flawed approach to judicial review that poses a significant threat to routine exercises of legislative and regulatory authority by cities and States.

Application of the court of appeals' methodology to legislative and administrative actions taken by States and municipalities would seriously impair the ability of these bodies to engage in routine economic regulation. Not only does the court of appeals' approach impermissibly intrude on legislative power, many state and local governments lack the resources to develop the detailed legislative record required by the court of appeals, or to defend the multiplicity of challenges that its methodology would invite. The intrusive approach to judicial review adopted by the court of appeals therefore presents an even graver threat to state and local legislative authority than it does to the legislative authority of the federal petitioner in this case.

Because the court of appeals' analysis, unless corrected, could have serious negative consequences in areas of vital interest to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

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[1] In accordance with Rule 37 of the Rules of the Supreme Court of the United States, the parties' letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Amici adopt petitioners' statement of the case and set forth the following summary of facts and procedural history relevant to *amici*'s argument.

At issue in this case is the Cable Act's [2] exemption from regulation of those cable communications facilities "that serve[] only subscribers in 1 or more multiple unit dwellings under common ownership, control. or management, unless such facility or facilities uses any public right-of-way." 47 U.S.C. § 522(6)(B). To fall within the scope of this exemption, a facility must (1) serve only subscribers in multiple unit dwellings in buildings which are all under common ownership, control, or management; *and* (2) not use any public right-of-way. The plain language of this exemption expressly leaves subject to state or local regulation those satellite master antenna television (SMATV) facilities that use cable to link separately owned buildings and do not use any public right-of-way, even though physically similar SMATV facilities that link commonly owned buildings are exempted from such regulation.[3]

In its initial consideration of respondents' challenge to the statute, the court of appeals found that the legislative distinction between facilities linking commonly owned multi-unit dwellings and those linking separately owned multi-unit dwellings raised equal protection concerns under the due process clause of the fifth amendment. Pet. App. 31-36a. It asked

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[2] The Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.*

[3] The terms "commonly owned" and "separately owned" are used herein as shorthand references encompassing ownership, control, and management.

the FCC to supply it with "additional 'legislative facts' concerning the distinction . . . ." *Id.* at 36a. Chief Judge Mikva wrote a separate opinion in which he identified several conceivable bases for the legislative distinction and criticized the panel majority for showing "too little reluctance to overturn complex economic legislation under the minimal rational-basis test". Pet. App. 37a.

Unsatisfied with the response of the FCC to its request for additional legislative information, Pet. App. 46-52a, the panel majority, in a second opinion, struck down the legislative distinction as a violation of equal protection. Pet. App. 4a. It based its holding on the failure of the FCC to "flesh out" the rationales suggested by Chief Judge Mikva "or to suggest some alternative rationale." *Id.*

SUMMARY OF ARGUMENT

Judicial review of legislation is "the gravest and most delicate duty that this Court is called upon to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). The Court accordingly applies a highly deferential standard of review when assessing the validity of state or federal regulatory statutes. "States are accorded wide latitude in their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Legislative "line drawing" is presumptively valid and must be upheld if any conceivable basis for it exists: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Moreover, those challenging the distinc-

tion bear the burden of demonstrating that such facts "could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

The court of appeals disregarded these rules, and more. Despite the highly plausible justifications for the Cable Act's classification that were advanced by Chief Judge Mikva and adopted by the FCC, Pet. App. 50a, the panel majority nonetheless invalidated the challenged statutory provision. The basis for its decision was the perceived failure of the agency to "flesh out" the rationales suggested by Chief Judge Mikva, "or to suggest some alternative rationale." *Id.* at 4a.

In so doing, the panel majority erroneously placed the burden on the agency by insisting that it offer "legislative facts" sufficient to justify to the court's satisfaction the regulatory distinction drawn by Congress. *See* Pet. App. 36a. When conceivable bases for the distinction were brought to its attention in Chief Judge Mikva's concurrence (and subsequently endorsed by the FCC) the court of appeals did not require that those bases be disproved by respondents, as the rational basis standard would require. Instead, it cavalierly dismissed them out of hand as "naked intuition." Pet. App. 4a.

Amici submit that if the court of appeals' unprecedented approach to rational basis review is not corrected, routine state and city regulatory legislation will henceforth be subject to a heightened review that will seriously impede the functioning of government. As the Court has said, "the machinery of government would not work if it were not allowed a

little play in its joints." *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931). The Court has, moreover, repeatedly recognized that "[a] state legislature . . . . cannot record a complete catalogue of the considerations which move its members to enact laws." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 510 (1937), *quoted in Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). Only by virtue of a very strong presumption of the validity of legislation, based upon the legislature's singular awareness of the conditions giving rise to statutory classifications, "is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Id.*

With respect to the specific issue of regulatory control presented, the court of appeals' decision improperly invalidated a clear, express legislative determination. The Cable Act plainly states on its face that factors other than the use or nonuse of public rights-of-way determine whether a particular SMATV facility is subject to state and local control. Rather than assessing the rationality of the resulting distinction on its own terms by exploring conceivable bases and requiring them to be disproved, the court deemed the distinction irrational—apparently because it deviated from the court's own notion of the use of a public right-of-way as the proper benchmark for regulation. *See* Pet. App. 4a; Pet. App. 34-35a.

The court of appeals thereby erred. Regardless of whether Congress *could have* chosen to predicate state and local regulatory authority on use of public rights-of-way, it did not do so. Because this legislation did not result in a legislative distinction so "palpably arbitrary" as to offend equal protection, the court of appeals could not validly tamper with

that choice simply because it found a different division of power more conceptually appealing. *See, e.g., Metropolis Theater Co. v. City of Chicago*, 228 U.S. 61, 69 (1913).

ARGUMENT

I. THE COURT OF APPEALS PROFOUNDLY ERRED IN THE MANNER IN WHICH IT CONDUCTED RATIONAL BASIS REVIEW OF THE CABLE ACT

The decision to invalidate legislation on constitutional grounds "is the gravest and most delicate duty that this Court is called upon to perform." *Rust v. Sullivan*, 111 S. Ct. 1759, 1771 (1991) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)). In *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Powell applied *Blodgett*'s admonition to federal court review of state legislation, cautioning that "[t]he awesome power of this Court to invalidate . . . legislation . . . must be exercised with the utmost restraint." *Id.* at 464 & n.67 (Powell, J., dissenting) (citation omitted).

The Court accordingly affords a strong presumption of validity to legislation, particularly regulatory legislation that requires line drawing. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," *McGowan v. Maryland*, 366 U.S. 420, 426 (1961), and the burden is on those challenging the legislation to show that no such facts exist. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). This settled regime is essential to the proper working of government at all levels—state and local as well as federal.

The court of appeals flouted each of these rules and concerns in its review of the challenged distinction

drawn in the Cable Act. It blithely invalidated the clear, express language of economic regulatory legislation without regard to the presumption of validity. It ignored rationales for the legislative distinction articulated by Chief Judge Mikva and adopted by the FCC. It improperly faulted the agency for failing to further "flesh out" the rationales for the legislative distinction rather than requiring respondents to disprove the conceivable bases for the distinction. The court below, in short, created an erroneous precedent that undermines the proper functioning of government by improperly expanding the role of the federal judiciary in an area of utmost sensitivity and importance.

A. Legislative Line Drawing Carries A Strong Presumption of Validity and Must Be Upheld If Supported By Any Conceivable Basis

The universe of cable communications technology encompasses a wide array of types of facilities. In deciding which technologies would be subject to local regulation, Congress was required to engage in line drawing. Recognizing the inherent difficulties involved in drawing a line within a given spectrum, the Court has traditionally afforded a strong presumption of validity to such legislative efforts. *See, e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976).

To survive rational basis review, a line need not be drawn with mathematical precision. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 814 ("a surveyor's precision" is not required in making legislative distinctions).[4] A valid classification may be

[4] *See also City of Dallas v. Stanglin*, 490 U.S. 19, 27 (1989) (classification need not be made with "mathematical nicety")

underinclusive, overinclusive, or both. *See, e.g., Vance*, 440 U.S. at 103; Laurence H. Tribe, *American Constitutional Law* § 16-4 (2d ed. 1988). As the Court stated in *Weinberger v. Salfi*, 422 U.S. 749, 777 (1975), "the question raised is not whether a statutory provision precisely filters out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute." Assertions that the line could have been drawn in a different or more precise manner are irrelevant. *See U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (classification "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line . . . .") (internal citation omitted).[5] For all of these reasons, the Court has cautioned that

(citing *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970) and *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)); *City of New Orleans v. Dukes*, 427 U.S. at 303 ("rational distinctions may be made with substantially less than mathematical exactitude"); *Heath & Milligan Mfg. Co. v. Worst*, 207 U.S. 338, 354-55 (1907) ("exact wisdom and nice adaptation of remedies" not required).

[5] In areas of economic regulation, very fine distinctions have routinely been upheld. *See, e.g., City of Dallas v. Stanglin*, 490 U.S. at 27-28 (upholding a statute which distinguished between skating and dancing, noting that "[t]he differences between the two activities may not be striking, but differentiation need not be striking in order to survive rational-basis scrutiny."); *Texaco, Inc. v. Short*, 454 U.S. 516, 539-40 (1982) (upholding the exemption of owners of ten or more mineral interests in one county from the lapsing of interest); *Heath & Milligan Mfg. Co.*, 207 U.S. at 355-56 (upholding distinction between types of paint for purposes of a labeling requirement).

> We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) (footnotes omitted).[6]

The Court has embodied these concerns in its test for determining whether state or federal regulatory legislation survives an equal protection challenge. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (state legislation) (collecting cases). *See also Sullivan v. Stroop*, 496 U.S. 478, 485 (1990) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 601 (1987)). Under this standard, any conceivable purpose attributable to a rational legislature will suffice, whether or not that purpose motivated the legislature or was articulated by the legislature. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. at 179.[7] As the Court emphasized in *Fritz*:

[6] *See Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) ("The equal protection obligation imposed by the Due Process Clause of the Fifth Amendment is not an obligation to provide the best governance possible."); *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 425 (1952) ("if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision").

[7] The "conceivable purpose" must, of course, be a legitimate governmental objective. *Zobel v. Williams*, 457 U.S. 55, 63 (1982).

> Where . . . there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.

Id. (citing *Flemming v. Nestor*, 363 U.S. 603, 612 (1960)). Nor, in its search for a conceivable basis for a distinction, is a court "bound by explanations of the statute's rationality that may be offered by litigants or other courts." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 463 (1988).

Under this Court's cases, moreover, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance*, 440 U.S. at 110-11. *See Lindsley*, 220 U.S. at 78-79 ("one who assails the classification in such a law must carry the burden of showing that it is arbitrary . . . ").[8] Because the challenging party bears this burden, "[t]he State is not compelled to verify logical assumptions with statistical evidence." *Vance*, 440 U.S. at 111 n.28 (citation omitted). *See also Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812 (1976). The burden is a very heavy one: "[M]erely tendering evidence in court that the legislature was mistaken" is insufficient. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S.

[8] *See also Lehnhausen*, 410 U.S. at 364 (" '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' ") (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)).

456, 464 (1981). If the facts are "at least debatable," the distinction must be upheld. *Id.*[9]

B. Minimum Scrutiny Rational Basis Review Is Essential to the Proper Functioning of Government

There is no alternative to the foregoing "relaxed and tolerant form of judicial scrutiny," *City of Dallas v. Stanglin*, 490 U.S. at 26, if the system of government created by the Constitution is to function in our complex world. The Court has long recognized that "the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co.*, 282 U.S. at 501. *See also Kotch v. Board of River Port Comm'rs*, 330 U.S. 552, 556 (1947). As Chief Judge Mikva explained below:

> Because the only alternative would be to discourage legislators from making even an attempt to address complicated social and economic problems, the Constitution wisely permits legislative bodies to piece together practical plans—"rough accommodations," as the Supreme Court put it long ago, "illogical, it may be, and unscientific."

Pet. App. 38a (quoting *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913)). *See City of Dallas v. Stanglin*, 490 U.S. at 26; *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970). "Great freedom of discretion" must necessarily be afforded

[9] *See Vance*, 440 U.S. at 112 ("it is the very admission that the facts are arguable that immunizes from constitutional attack the congressional judgment represented by this statute") (citing *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916)). *See also Heath & Milligan Mfg. Co.*, 207 U.S. at 355-56 (rejecting equal protection challenge because the "record certainly does not present any *data* to make it certain that the discretion was arbitrarily exercised") (emphasis in original).

legislatures "on account of the complex problems which are presented to the government." *Heath & Milligan Mfg. Co.*, 207 U.S. at 354.

This tolerance for inexact legislative solutions furthers another constitutionally recognized objective—that of "legislative convenience." *Vance*, 440 U.S. at 109. Equal protection does not mandate the depletion of government resources that would accompany a case-by-case factual assessment where economic regulation is involved. *See id.* at 109; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 316 (1976) (declining to fault State's legislative classification concerning continuing fitness for employment merely because "the State chooses not to determine fitness more precisely through individualized testing"). Imperfect classifications are therefore tolerated even though they may not reach all, or only, those whom the legislature wishes to target.

The alternative would make the regulatory work of state, city, and federal government unduly cumbersome or even impossible. The Court has acknowledged, for example, that a state legislature

> cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. *Only by faithful adherence to this guiding principle of review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.*

Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 510 (1937) (emphasis added), *quoted in Lehnhausen*, 410 U.S. at 364-65.

The large volume of legislation which the States enact each year, coupled with budgetary limitations on staff size, limits their ability to develop detailed legislative records documenting the motivation behind each regulatory distinction. *See* Council of State Governments, *The Book of the States: 1992-93 Edition* at 183-84 (1992) (reporting the number of bills and resolutions introduced and enacted in each State's legislature during the 1990 and 1991 regular sessions); *id.* at 132 (noting that, in recent years, "budget problems in many states have slowed the growth in the number of legislative staff"). Indeed, some state legislative bodies do not even produce an indexed, permanent journal of legislative action, making the reconstruction of legislative intent even more difficult. *See* National Conference of State Legislatures, *Inside the Legislative Process* 90-91 (1991).

Local governments are, in many cases, even less well-equipped than States to furnish legislative history in support of challenged regulatory distinctions. The minutes maintained by local governments—typically their only documentation of legislative action—frequently do not record the arguments made in support of and in opposition to legislation; they often contain little more than the voting record on a given enactment.

For these reasons, *amici* respectfully submit that the intrusive approach to judicial review adopted by the court of appeals would not only impede the functioning of the federal government, it would—to an even greater degree—impair the exercise of regulatory authority by States and local governments.

C. The Court of Appeals Failed Properly to Conduct Rational Basis Review

The court of appeals plainly failed to conduct its review of the Cable Act in accordance with the foregoing standards. The approach of the panel majority to this case, in Chief Judge Mikva's words, evidenced "too little reluctance to overturn complex economic legislation under the minimal rational-basis test." Pet. App. 37a.

Congress' decision to classify SMATV facilities serving commonly owned buildings differently than SMATV facilities serving separately owned buildings should have been upheld because, as is demonstrated below, ample "facts reasonably may be conceived to justify" the classification. *McGowan v. Maryland*, 366 U.S. at 426. *See* discussion *infra* at 17-21. Because this test is plainly satisfied, it is irrelevant for purposes of constitutional analysis that other regulatory classifications of SMATV facilities are imaginable, either by the courts or the parties, or that criticisms may be made by certain interested persons against the line ultimately drawn by Congress. It is, for example, irrelevant that Congress' classification of SMATV facilities may be faulted for underinclusiveness, overinclusiveness, or both. *See, e.g., Massachusetts Bd. of Retirement*, 427 U.S. at 314-17 (upholding mandatory retirement age set by state law despite its overinclusiveness). Hence, respondents' contention that some SMATV facilities serving commonly-owned buildings may be larger than some serving separately-owned buildings (Br. in Op. at 15) is of no moment.

The court of appeals compounded its error by requiring the agency to "flesh out" reasons for the distinction, and invalidating the statute because of the

agency's asserted failure to do so. This Court's cases require respondents, as those "assail[ing] the legislative judgment," to "carry the burden of showing that it is arbitrary." *Lindsley*, 220 U.S. at 78-79. Instead, the court appeals improperly relieved respondents of this burden altogether by simply dismissing proffered bases for the distinction as "naked intuition." Pet. App. 4a. Respondents instead should have been required to prove—beyond debate, *Minnesota v. Clover Leaf Creamery*, 449 U.S. at 464—that the classification "is both arbitrary and irrational." *Kadrmas*, 487 US. at 463. Moreover, the motivation for a legislative distinction is not legally relevant to the reviewing court's limited task. *See Fritz*, 449 U.S. at 179. In reviewing the rationality of the line drawn in the Cable Act, the court of appeals' task was to determine whether respondents had conclusively disproven any and all proffered bases for the distinction as well as those otherwise apparent from the face of the statute, an inquiry that the court totally failed to undertake.

A judicial requirement that sufficient legislative facts be adduced to support each challenged regulatory measure is unwarranted and constitutionally subversive. The court of appeals' novel and expansive approach to rational basis review threatens not only the ability of Congress to engage in routine economic regulation, but in a like respect the functioning of state and local governments. For these reasons, *amici* respectfully request that the judgment below be reversed.

II. THE DISTINCTION DRAWN IN THE CABLE ACT EASILY SATISFIES RATIONAL BASIS REVIEW

A. There Are Multiple Conceivable Bases For the Definitional Distinction Between Facilities Serving Commonly and Separately Owned Multi-Unit Dwellings

The distinction drawn in the Cable Act must be upheld on rational basis review if any conceivable purpose for it exists. Hence the statute must be upheld if even *one* of the reasons offered for it or otherwise discernable from the statute has a rational basis. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 465. In fact, at least three reasons support the challenged legislative classification.

1. *SMATV Facilities Serving Separately Owned Buildings Present Problems To the Viewer Similar To Those Associated With Traditional Cable Systems*

In his concurring opinion, Chief Judge Mikva suggested that Congress could reasonably have distinguished between facilities serving commonly and separately owned buildings on the ground that the latter are "similar to a traditional cable system and likely to give rise to similar problems from the perspective of the viewer." Pet. App. 43a (Mikva, C.J., concurring). Because they are unable to resort to a single landlord or building manager, residents served by a quasi-private SMATV system would be less able to ensure that the system was responsive to their needs and interests. *See id.* at 43a. As Chief Judge Mikva noted, this rationale corresponds with one of the purposes stated on the face of the Cable Act: to "establish franchise procedures and standards . . . which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2); *see* Pet. App. at 43a.

2. *SMATV Facilities Serving Separately Owned Buildings Present Diversity Of Information Problems Similar To Those Presented By Traditional Cable Systems*

Another purpose of the Cable Act, stated on the face of the statute, is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521(4). As Chief Judge Mikva noted, Congress might rationally have believed that regulation of quasi-private SMATV facilities was necessary to encourage diversity of information, whereas the wholly private systems, which are usually smaller and more susceptible of viewer input, would present less of a concern in this regard.[10] Pet. App. at 43a. Congress could have rationally chosen to draw a line between quasi-private and wholly private facilities so as to minimize the threat to diversity of information while preserving the ability of landlords to procure service for residents in their own building complexes.[11]

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[10] The fact that counterexamples could be imagined (*e.g.*, a given quasi-private system might serve fewer viewers than a given wholly private system) provides no basis for rejecting this rationale, as long as Congress could rationally have found that, on balance, the classification furthered its purpose. A statutory distinction may be both underinclusive and overinclusive without running afoul of the equal protection clause. *See* discussion *supra* at 8-9.

[11] The fact that Congress has left unregulated another universe of communications technology—facilities such as microwave or satellite systems that do not use physical cables—that might also present similar diversity concerns is of no relevance. Congress may choose to regulate incrementally, or may find that with respect to non-cable technologies the costs of regulation outweigh the benefits. It is well settled that equal protection principles do not prohibit a piecemeal, limited, or phased approach to a particular regulatory field. *See, e.g., Dukes*, 427 U.S. at 305; *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

3. *SMATV Systems Serving Separately Owned Buildings Present Competitive and Distributional Equity Problems Similar to Those Presented By Traditional Cable Systems*

Congress could also have rationally based its distinction between facilities serving commonly and separately owned buildings on the relative ability of free market forces to operate in those respective realms. Where an SMATV system serves commonly owned or operated buildings, the single owner or manager can weigh the offers of various SMATV providers and select the one that best suits the needs of the subscribers (as those needs have been communicated to the single owner or manager). In such an instance, effective competition between various SMATV providers can exist.

In contrast, where buildings in a complex are owned and managed by multiple parties, there is no coordinating mechanism for negotiating for the best system for all of the subscribers affected. Indeed, as noted earlier, there is not even any centralized method for determining what the needs and interests of the various subscribers are. Congress could well have decided that a single owner going out into the competitive marketplace to procure SMATV service is in a fundamentally different position requiring less regulatory protection than are unrelated concerns, lacking any centralized mechanism for decisionmaking, that seek to procure cable service for their entire collective communities.

Moreover, the limited scope of the wholly private SMATV system does not present the same "cream

skimming" threat to existing franchised systems as does the quasi-private system. Permitting unregulated SMATV systems to serve low-cost, high-profit pockets of consumers erodes the central economic premise of a franchising system—that of cost-spreading. *See* Br. Nat'l. Cable Television Ass'n (NCTA) in Support of Petition for Certiorari at 14-15; James C. Goodale, *All About Cable: Legal and Business Aspects of Cable and Pay Television* 5-28 (1992). *See also* Daniel L. Brenner, *et al.*, *Cable Television and Other Nonbroadcast Video: Law and Policy* § 3.02[7] at 3-26 n.13 (1992).

One of the evident purposes of the Cable Act was to provide distributional equity in the provision of cable services. Section 621(a)(3) of the Cable Act specifically requires that a franchising authority "assure that access to cable service is not denied to any group of potential residental cable subscribers because of the income of the residents of the local area in which such group resides." 47 U.S.C. § 541 (a)(3). This provision was included to prevent cable operators from "redlining" their service area to exclude less profitable segments of the market. *See* Brenner, *Cable Television* §§ 3.02[7] at 3-26 (citing H.R. Rep. No. 934, 98th Cong., 2d Sess. 59, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696). Hence, the franchising system allows a city to require that a cable system provide "service to all areas of the city, including poor or sparsely populated areas that might not get cable television unless the franchise specifically required that they be served." Goodale, *All About Cable* § 4.02[1] at 4-7. If desirable low-cost pockets of consumers are "skimmed off" by an unregulated SMATV system, community-wide cable operators will be prevented from cross-subsidizing their higher cost

customers with the profits from their lower cost customers.[12] The result is higher rates—or no service—for the higher cost, lower profit segment of the market, a result antithetical to the basic precepts of community-wide franchising.

B. Congress Predicated the Scope of Regulation on the Distinction Between Commonly and Separately Owned Multi-Unit Dwellings, Not On Use or Non-Use of Public Rights-of-Way

The failure of the court of appeals extends beyond its rejection of these conceivable bases to its improper reliance on its own erroneous presumption that state and local authority is necessarily premised upon, and limited to, a facility's use of a public right-of-way. While the use by cable systems of public rights-of-way has been an historical justification for state and local regulatory control, *see, e.g.*, Goodale, *All About Cable* § 4.03 at 4.34, the court of appeals erred in relying upon that premise when conducting its rational basis review of the express statutory distinction in the Cable Act.

As the court of appeals recognized, the plain language of the statute indicates Congress' unambiguous intent to commit to state and local authority the regulation of many cable facilities which *do not* use public rights-of-way—indeed, all such facilities *except* those used to link commonly owned multi-unit

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[12] In *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 811 n.7 (D.C. Cir. 1984), the court of appeals held that SMATV systems did not present distributional equity concerns since they involve "installation of an earth station on private property." *Id.* When, however, an SMATV system extends beyond the boundaries of commonly owned property to a larger community via cable connections, distributional equity concerns plainly emerge.

dwellings. *See* Pet. App. at 2a; 24a. Hence the distinction at issue reflects Congress' express choice to go beyond the public right-of-way rationale in giving state and local governments regulatory power over cable communications systems. It defies established standards of rational basis review for a court to strike down a statutory distinction because it fails to divide the universe on a particular historical basis which the court finds compelling but upon which Congress, as the FCC painstakingly pointed out, has unambiguously declined to rely. *See In re Definition of a Cable System*, 5 F.C.C. Rcd. 7638, 7641-42 (1990).

The court of appeals' rejection of the statutory distinction expressly chosen by Congress in favor of the right-of-way distinction is almost syllogistic:

> We can conceive of no reason why an *external*, *quasi-private* SMATV facility, but not a *wholly private* facility, should be subject to local franchising. Neither uses a public right-of-way.

Pet. App. at 4a (footnotes omitted) (emphasis in original). The unstated premise of the court of appeals' statement is that local franchising authority necessarily depends upon use of a public right-of-way. The court goes on summarily to dispense with proffered conceivable bases for the distinction on the grounds that the FCC "has wholly failed to flesh these out or to suggest some alternative rationale." *Id.* The court of appeals thus begins with the assumption that the only conceivable purpose for allowing cities to regulate cable facilities is the historical "purpose" of allowing them to regulate their own public rights-of-way, and requires compelling, "fleshed out" proof of any alternative or additional

purpose for allowing local control. Not only does this methodology place the burden on the wrong party in contravention of well-settled principles of rational basis review, *see* discussion *supra* at 11-12, it introduces an extraneous and legally irrelevant factor into the analysis—an historical justification that Congress intentionally chose not to rely upon in drafting the legislation.

In this case, the court of appeals applied a heightened level of scrutiny to a congressional decision to extend state and local control beyond a point which the court itself apparently viewed as the appropriate boundary—the use of a public right-of-way. Yet Congress, not the judiciary, is the appropriate body to decide whether and on what basis to confer regulatory authority on States and cities in the cable television field. Simple judicial disagreement with the resulting division of authority does not empower a court to override that decision or to create a presumption against its validity. *See, e.g., Ferguson*, 372 U.S. at 731-32. Instead, the task of a reviewing court is limited to determining whether those challenging the statutory distinction have carried their heavy burden of proof and shown it to be "so palpably arbitrary" as to offend equal protection. *Metropolis Theater*, 228 U.S. at 69.

The logical implication of the court of appeals' decision is to place in question the ability of cities to regulate *any* cable facilities that do not use a public right-of-way—whether or not those facilities link multi-unit dwellings. *See* Br. NCTA 12 & n.34. Indeed, the court of appeals' decision has already been viewed by some as permitting unfranchised SMATV systems to link up single family homes in private

residential communities and trailer parks, as long as no public right-of-way is used. *See id.* at 15 n.38; *SMATV Ruling Appealed to High Court*, Multichannel News, November 9, 1992 at 37.[13] It is evident that the larger the SMATV loophole is expanded, in this and other ways, the less meaningful will be the remaining control which States and local governments have over "traditional" cable systems.

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[13] The recent rapid growth of private residential communities makes this potential effect particularly significant. *See* Advisory Commission on Intergovernmental Relations, *Residential Community Associations: Private Governments in the Intergovernmental System?* 3 (1989) (estimating that there may be as many as 130,000 residential community associations in the United States, ranging in "population size from fewer than ten residents to as many as 68,000").

Moreover, an interpretation that would extend the Cable Act's exception to SMATV facilities serving single family homes in private communities would contravene "[l]ongstanding [FCC] precedent, legislative intent, and the clear language of the Cable Act and the Commissioner's Rules." *In re Massachusetts Community Antenna Television Commission*, 2 F.C.C. Rcd. 7321 (1987) (rejecting a contention that a facility serving a private residential development without using any public right-of-way was exempted from local franchising requirements), *appeal dismissed sub nom Channel One Systems, Inc. v. FCC*, 848 F.2d 1305 (D.C. Cir. 1988).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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